80-11

Supreme Court, U. S.
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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

J. GREGORY MERRION AND ROBERT L. BAYLESS,
d/b/a MERRION AND BAYLESS, JEROME T. McHUGH,
CHASE OIL COMPANY, DUGAN PRODUCTION CORPORATION,
CONSOLIDATED OIL AND GAS, INC.,
SOUTHLAND ROYALTY COMPANY, TESORO
PETROLEUM CORPORATION, AMERADA HESS CORPORATION,
SUPRON ENERGY CORPORATION, ENERGY RESERVES GROUP, INC.,
J. M. HUBER CORPORATION, CONTINENTAL OIL COMPANY
(now CONOCO INC.),
ATLANTIC RICHFIELD COMPANY,
PHILLIPS PETROLEUM COMPANY, TENNECO OIL COMPANY,
GETTY OIL COMPANY, GULF OIL CORPORATION, MOBIL OIL CORPORATION,
AND OXY PETROLEUM, INC.,

Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE
TRIBAL COUNCIL, AND CECIL ANDRUS,
SECRETARY OF THE INTERIOR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIOARAI

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APPENDIX A

Opinion of the United States Court of Appeals for the Tenth Circuit, decided February 22, 1980.

Revised Page 6 of Opinion, entered April 25, 1980.

2-22-80 78-1154 — 78-1251

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 78-1154

J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company, Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, and Gulf Oil Corporation,

Plaintiffs-Appellees,

v.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, and Cecil Andrus, Secretary of the Interior,

Defendants-Appellants.

Mobil Oil Corporation, and Oxy Petroleum, Inc.

Intervenors-Appellees.

No. 78-1251

Amoco Production Company and Marathon Oil Company,

Plaintiffs-Appellees,

v.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, Cecil Andrus, Secretary of the Interior,

Defendants-Appellants.

Appeal from the United States District Court
For the District of New Mexico
(D.C. Nos. 77-292P & 77-343P)

Robert J. Nordhaus and Terry D. Farmer, of Nordhaus, Moses & Dunn, Albuquerque, New Mexico, for Defendants-Appellants, Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Gwendolyn Velarde.

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John R. Cooney of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico (R. H. Landt of Amoco Production Company, Denver, Colorado, Richard L. Marler of Marathon Oil Company, Findlay, Ohio, Mark B. Thompson, III, of Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, New Mexico, with him on the briefs), for Plaintiffs-Appellees Amoco Production Company and Marathon Oil Company.

George P. Vlassis (Lawrence A. Ruzow, Katherine Ott, Gary Verburg, of counsel) of Vlassis, Ruzow & Crowder, Phoenix, Arizona, filed an amicus curiae brief for the Navajo Nation.

Reid Peyton Chambers of Sonosky, Chambers & Sachse, Washington, D. C. and Marvin J. Sonosky of Washington, D. C., of counsel, filed an amicus curiae brief for the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes.

Charles A. Hobbs of Washington, D. C., filed an amicus curiae brief for National Congress of American Indians,

Inc., the Arapaho Tribe of the Wind River Reservation, and the Three Affiliated Tribes of The Fort Berthold Reservation.

Toney Anaya, Attorney General, and Jan Unna, Special Assistant Attorney General, the State of New Mexico, Santa Fe, New Mexico, filed an amicus curiae brief for the State of New Mexico.

Robert B. Hansen, Attorney General, Richard L. Dewsnup, Dallin W. Jensen, Frank V. Nelson, Assistants Attorney General, of the State of Utah, Salt Lake City, Utah, filed an amicus curiae brief for the State of Utah.

John J. Rooney, Acting Attorney General, the State of Wyoming, Cheyenne, Wyoming, Alan I. Olson, Attorney General, the State of North Dakota, Bismarck, North Dakota, and Mike Greeley, Attorney General, the State of Montana, Helena, Montana, filed an amicus curiae brief for the States of Wyoming, North Dakota and Montana.

Before SETH, Chief Judge, HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY and LOGAN, Circuit Judges (en banc).

LOGAN, Circuit Judge.

This appeal arises out of two suits, consolidated for trial, brought by appellees against the Jicarilla Apache Tribe and its Tribal Council (the Tribe). Appellees (lessees), who are non-Indians, produce oil and gas from within the Tribe's reservation pursuant to leases granted them under the auspices of the Secretary of the Interior. After the Tribe enacted an oil and gas severance tax to be measured by production from oil and gas wells within the reservation,

lessees sued the Tribe and Secretary of the Interior, Cecil Andrus,[1] seeking a declaratory judgment and injunction that would prohibit enforcement of this tax. After a nonjury trial, the judge permanently enjoined enforcement declaring the tax "illegal, unconstitutional, invalid and void."

The issues on appeal are whether,

(1) the district court had jurisdiction over the claims against the Tribe and the Secretary of the Interior,

(2) the Tribe has the inherent power to levy the severance tax,

(3) the tax violates the Commerce Clause of the United States Constitution, and

(4) Congress preempted tribal taxation.

The Jicarilla Apache Tribe is an Indian Tribe occupying an executive order reservation in northwestern New Mexico. The Tribal Council is the legislative arm of the Tribe's government. In 1968 the Tribe adopted a revised constitution pursuant to the Indian Reorganization Act of 1934, §§ 16, 17, 25 U.S.C. §§ 476, 477. Article XI of that constitution provides, in pertinent part,

> Section 1. The inherent powers of the Jicarilla Apache Tribe, including those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department

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[1] In one of the essentially identical cases Gwendolyn Velarde, Treasurer of the Tribe, and Tony Martinez, Executive Director of the New Mexico Oil and Gas Accounting Commission, were named as individual defendants. Prior to trial Martinez was dismissed from the suit without prejudice.

> of the Interior and the restrictions established by this revised constitution.
>
> . . . .
>
> (e) Taxes and Fees. The tribal council may levy and collect taxes on fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

The revised constitution was approved by the Under Secretary of the Interior in 1969.

In 1976 the Tribal Council adopted an ordinance imposing a severance tax on "any oil and natural gas severed, saved and removed from Tribal lands." The operators are required to pay the tax, which is due at the time of severance and is payable monthly. The tax rate is assessed at the wellhead per barrel of crude oil and per million BTU of natural gas "sold or transported off the Reservation." "Royalty gas, oil or condensate, taken by the Tribe in kind, and used by the Tribe" is exempt from taxation. The Secretary, through the Acting Area Director of the Bureau of Indian Affairs, formally approved the tribal ordinance in December of 1976.

Among the trial court's findings are the following: Approximately 80% of the oil and gas produced by lessees is shipped interstate for sale outside the state of New Mexico; the tax would generate over two million dollars annually; the lessees would be able to pass the majority of the tax burden on to their customers; if the lessees are required to absorb the tax, the ability of some of the lessees to operate profitably some of the existing oil wells on the reservation would be substantially limited; those lessees not able to profitably operate wells "would be required to shut down such wells resulting in a loss of natural resources

and an unjust return of the wells to the Jicarilla Apache Tribe"; and the tax burden on the price of oil and gas would be more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

Based upon these findings the trial court held that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empower the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple burden on interstate commerce in violation of the Commerce Clause.

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* At trial, however, lessees abandoned this contention. Thus, no finding was made concerning whether the Secretary acted beyond his statutory authority or unconstitutionally. Absent this determination, the suit is in reality against the United States, which has not waived its sovereign immunity from suit. *See* Tewa Tesuque v. Morton, 498 F.2d 240, 243 (10th Cir. 1974). *See also* Califiano v. Sanders, 430 U.S. 99, 105-07 (1977) (APA is not an independent grant of federal jurisdiction). We therefore hold the trial court was without power to enjoin the Secretary of the Interior.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court

was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe cannot be sued absent consent. *See also* Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165 (1977). Here the Tribal Council, as the duly constituted legislative body of the Tribe, by the terms of the severance tax ordinance, expressly consented to suits against the Tribe in the United States District Court or in the Jicarilla Apache Tribal Court. The ordinance was approved by the representative of the Secretary of the Interior. The question is whether this constitutes effective consent.

We see no reason in principle or in law to conclude a Tribe that has taken advantage of Congress' encouragement to organize for purposes of providing for its common welfare under 25 U.S.C. § 476, has adopted a constitution, and has formally attempted to waive its sovereign immunity in this ordinance, may not do so. We believe the grant of power under the Indian Reorganization Act of 1934 is broad enough to encompass express waiver of sovereign immunity to suit when the ordinance, as here, has been specifically approved by the Secretary of Interior. We therefore hold the trial court had jurisdiction over the Tribe.[3]

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[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

[3] Even were we to conclude the ordinance did not constitute effective consent, it is clear that the court properly reached the merits in one of the cases consolidated for trial. Plaintiffs Amoco Production Company and Marathon Oil Company, in addition to naming the Tribe and Tribal Council as defendants, sued individually the tribal official charged with the enforcement and collection of the tax. The Tribe's immunity from suit does not extend to tribal officials; therefore the trial court properly heard this case. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

II

In treating the merits of this appeal, we first consider the basic question whether the Tribe may impose a tax upon nonmembers of the Tribe doing business within the Tribe's territorial jurisdiction. The tax instituted by the Tribe here is an excise or privilege tax imposed on the occupation of severing oil and gas from tribal land, measured by quantity produced. *See* Ohio Oil Co. v. Conway, 281 U.S. 146 (1930); Flynn, Welch & Yates, Inc. v. State Tax Comm'n, 38 N.M. 131, 28 P.2d 889 (1934). *See also* Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). Since no treaty or act of Congress specifically authorizes the exercise of such a taxing power, we must decide whether that power is among those "vested in any Indian Tribe or tribal council by existing law," Indian Reorganization Act of 1934, § 16, 25 U.S.C. § 476, *i.e.*, whether the Tribe has the inherent power to levy this tax. In making this determination, we recognize the fundamental principle that the power of taxation, which is essential to the very existence of self-government, is an attribute of sovereignty and extends generally to all that is within that government's territorial jurisdiction. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428-29 (1819).

It has long been recognized that Indian tribes, although once self-governing political nations, no longer possess the full attributes of sovereignty. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless, the tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557 (1975); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). They retain those powers of self-government not voluntarily relinquished by treaty, not divested by Congress in the

exercise of its plenary authority over them, or not inconsistent with the superior interests of the United States as a sovereign nation. Oliphant, 435 U.S. at 208-09; United States v. Wheeler, 435 U.S. 313, 323 (1978).

While the Supreme Court has not passed directly upon the question before this Court, it has determined that certain powers were not retained by the tribes upon their incorporation because of the superior interests of the United States. It has long been established, for example, that the tribes, though rightful occupants of the soil, may not convey it at their will, superior title having vested in the United States. Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Because of the United States' interest in protecting its external political boundaries, the tribes as sovereign entities may not deal with foreign nations. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18 (1831). Most recently, the Supreme Court determined that the tribes also gave up the power to exercise criminal jurisdiction over non-Indians, on the ground the power of the tribes to restrict the personal liberty of United States citizens' conflicts with the federal government's overriding interest in protecting its citizens "from unwarranted intrusions on their personal liberty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978).

We do not find that tribal tax legislation in the context of this case necessarily and in every instance implicates a sovereign federal interest in the same way criminal adjudication, sale of tribal land, and governmental dealings with foreign nations does. The federal taxing power is in no way impinged; clearly the federal government can tax non-Indians or Indians within the reservation whether or not the Tribe levies this tax. Nor is there a general sovereign interest in preventing persons from being taxed by governmental entities other than itself.

A national, if not sovereign, interest in preventing deprivations of property without due process is manifested in the Fifth and Fourteenth Amendments. In the context of taxing, however, that interest is implicated only in the extremely rare case in which the taxing power is so abused the result is in reality not a tax, "but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." A Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934). *See also* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); Southwestern Oil Co. v. Texas, 217 U.S. 114 (1910). That is not the situation in the instant case.

Neither can we conclude that the "national interest in free and open trade" between the states, expressed by the Commerce Clause of the Constitution precludes tribal taxation. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). Just as the clause serves only as a limitation on state taxation powers, *id.* at 329, it limits but does not destroy tribal powers of taxation. *See* Part III, *infra.*

We recognize that in recent decisions bearing on the issue of inherent powers of Indian Tribes, the Supreme Court has occasionally employed language suggesting that Indians are without inherent powers over any nonmembers of their tribe. *See* Wheeler, 435 U.S. at 326; Oliphant, 435 at 208-11. For instance, the Court in *Wheeler* described powers not retained by tribes as those that "would necessarily be lost by virtue of a tribe's dependent status." 435 U.S. at 326. For several reasons we do not believe this language was intended to dispose of a case like the one at issue here.

First, the formulation seems to be merely descriptive of the conclusion that in certain circumstances powers were not retained, and is not a *test* for determining the existence

of inherent powers. The critical factor in the cases is whether important interests of the United States, other than Congress' basic interest in regulating the affairs of the Indians, conflict with assertions of tribal authority. If the test is whether the asserted tribal power is inconsistent with its dependent status, then the focal point becomes the tribal position, which is *always* one of dependence upon the United States. Carried to its logical conclusion, such a test would mean that a tribe possesses no inherent powers even over its members, because the tribe's very existence would depend upon affirmative enabling legislation by Congress. To the extent a tribe could exert power over its members, that power could only derive from the tribe's existence as a private, voluntary association. These conclusions are fundamentally inconsistent, of course, with the teachings of other decisions of the Court. The Court has expressly rejected the contention the tribes are no more than private, voluntary associations, United States v. Mazurie, 419 U.S. 544, 557 (1975), and has consistently held that tribal powers of self-government are inherent, derived from the tribe's original status as independent sovereign nations. *E.g.*, United States v. Wheeler, 435 U.S. 313, 322-323 (1978); Talton v. Mayes, 163 U.S. 376 (1896).

Also persuasive are Supreme Court decisions to the effect that the tribe's retained powers have at least some elements of territoriality. As early as 1823 the Court recognized in Johnson and Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1923), that voluntary transactions of nonmembers with the Tribes or their members within the confines of the reservation would subject that nonmember, at least regarding that transaction, to the laws of the tribe. *Id.* at 593. Similarly, Williams v. Lee, 358 U.S. 217 (1959), held that a state court was without jurisdiction to hear a simple contract action brought by a

nonmember against an Indian concerning a transaction entered into on the reservation. The Court's stated rationale was premised in part upon the territorial aspect of the tribe's right to self-government.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there . . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

Id. at 223 (citations omitted). *See also* United States v. Mazurie, 419 U.S. 544 (1975). While the territorial element of inherent tribal power is not necessarily exclusive, *see, e.g.*, Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Thomas v. Gay, 169 U.S. 264 (1898), and may not exist in some circumstances, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), we do not think the decisions eliminate this aspect of tribal powers.

We are also persuaded by "the commonly shared presumption of Congress, the Executive Branch, and the lower federal courts," Oliphant, 435 U.S. at 206, that the tribes retain the power to levy a tax that falls upon nonmembers doing business on the reservation. Prior to the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (the Act), which was intended to facilitate tribal self-government, one decision by the Supreme Court and three by the Eighth Circuit approved imposition of tribal taxes on nonmembers doing business on the reservation. *See* Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947 (8th Cir. 1905), *appeal dismissed without opinion*, 203 U.S. 599

(1906); Maxey v. Wright, 105 F. 1003 (8th Cir.), *aff'g* 3 Ind. Terr. 243, 54 S.W. 807 (1900); Crabtree v. Maxey, 54 F. 426 (8th Cir. 1893). The Attorney General of the United States also approved similar taxes. *E.g.*, Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901); Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884).

The parties to this appeal forcefully dispute the characterization of these decisions — the Tribe argues these decisions involved the inherent power to tax; the lessees argue they merely support the proposition that tribes have the proprietary, but not sovereign, right to exact fees from persons desiring to enter the reservation and do business therein. From our reading of the cases and opinions, we conclude that the decisions were grounded upon tribal sovereignty, with the exception of Choctaw and Chickasaw Permit Laws, 18 Op. Att'y Gen. 34 (1884). But two different sovereign powers have been relied upon — the power to tax, *e.g.*, Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the power to exclude nonmembers from the reservation and set the terms upon which such persons could enter and do business therein. *E.g.*, Buster v. Wright, 135 F. at 950. The Supreme Court in *Morris* v. *Hitchcock* appears to have recognized both theories. 194 U.S. at 389-93.

The case before us presents the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty. Thus, it seems important to ascertain whether particular treaties influenced the decisions discussed above. Although the United States did not always require tribes to give up the power to exercise civil jurisdiction over nonmembers and their property within the reservation, *see, e.g.*, Jurisdiction of the Courts of the Choc-

taw Nation, 7 Op. Att'y Gen. 174, 176 (1855), nearly all of these tribes had done so. *See, e.g.,* Morris v. Hitchcock, 21 App. D.C. 565, 593 (1903), *aff'd,* 194 U.S. 384 (1904). Yet throughout the decisions is the sometimes explicit and sometimes implicit assumption that tribal exercise of power over nonmembers doing business on the reservation in connection with that business did not offend the interests of the United States and was a sovereign right retained by the tribes. Two cases decided by the Eighth Circuit after passage of the Act expressly upholding tribal taxes on the theory of the power of taxation share this assumption. Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958), *cert. denied,* 358 U.S. 932 (1959); Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956).

Congress also apparently recognized tribal power to tax nonmembers within the reservation when it passed section 16 of the Act, which confirmed the existence of sovereign tribal powers generally. In hearings conducted prior to passage of the Act, Congress was apprised of the holding of Buster v. Wright, 135 F. 947 (8th Cir. 1905). *See To Grant To Indians Living Under Federal Tutelage The Freedom To Organize For Purposes of Local Self-Government and Economic Enterprise: Hearings on S.2755 and S.3645 Before The Senate Comm. on Indian Affairs,* 73d Cong., 2d Sess. 269-70 (1934). Solicitor Margold of the Department of Interior, in an opinion, considered the intent of Congress in its reference in section 16, to "all powers vested in any Indian tribe or tribal council by existing law." Among those retained powers, he concluded that

> [c]hief among the powers of sovereignty recognized as pertaining to an Indian Tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may

> accept privileges of trade, residence, etc., to which taxes may be attached as conditions.

Powers of Indian Tribes, 55 Interior Dec. 14, 46 (1934). This opinion, virtually contemporaneous with the Act, is persuasive evidence that neither Congress nor the Department of Interior believed a tribal taxing power would conflict with the interests of the United States. *See also* United States Department of the Interior, Federal Indian Law 435-39 (1958); 1 Final Report of the American Indian Policy Review Comm'n 154-58, 178-82 (1977). Consistent with its interpretation of the Act, the Department approved the tax involved in this case. As the agency charged with construction of the Act in the course of its actual execution, the Department's conclusion that Indian tribes retain the power to levy a tax of the type involved here deserves great respect. *See* Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 660 (1976).

Except for the dollar sums involved, which are irrelevant, *see* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), we see no essential difference between the privilege taxes here levied and those approved by the Supreme Court in *Morris* v. *Hitchcock* and in the Eighth Circuit cases cited above. For all the reasons discussed above, we conclude that the Tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers.

III

We now consider the argument that the severance tax violates the Commerce Clause. The Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. Art. I, § 8, cl. 3. We believe the national interest manifested in the Commerce Clause is not sufficient to pre-

clude the tribes' power to tax, but this clause of its own force limits the power of the tribes as well as the states. *See* Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977). It has long been established that the tribes constitute a separate category within that clause. The Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18-19 (1831). Since the tribes are not "states," *see id.* at 16, United States v. Wheeler, 435 U.S. 313 (1978), and necessarily are located within the boundaries of one or more states, they are not subject directly to those doctrines implementing the phrase "among the states."

It appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause. We hold the standard to be used in applying that clause is whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade. Our view is that this national interest is measured by traditional analyses. The trial court found the tax imposed by the tribe both discriminates against interstate commerce and constitutes a multiple burden on commerce. We treat first the discrimination question.

The trial court's stated reason for holding the tax discriminates against interstate commerce is that the tax "is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation." This reason, which simply tracks the language of the ordinance, can be interpreted in two ways.

The first interpretation is that the tax provides "a direct commercial advantage to local business." Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)). Although there actually is no Indian production here, the ordinance by its terms would apply to any operator engaged in severing the subject re-

sources within the reservation. Apparently, the trial court viewed the provision exempting "[r]oyalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe" as the requisite local preference. We disagree. Subjecting royalty products the Tribe would receive to its own tax would be a fruitless and wasteful act. We therefore think the exemption is permissible.

Second, in view of the trial court's finding that eighty percent of the hydrocarbons produced on the reservation entered interstate commerce, which we accept as true for purposes of this appeal, the court's conclusion of law can mean it believed the tax is to be levied on the privilege of engaging in interstate commerce itself. Were this correct, the standards of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977), and Department of Rev. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978), would be applicable.[4] However, it is settled that an

[4] The *Stevedoring* case, building upon *Complete Auto Transit* eliminated the distinction between direct and indirect taxation of interstate commerce when the tax is measured by gross proceeds. 435 U.S. at 743-51. With that distinction fell the *per se* rule forbidding taxation of interstate commerce. *Id.*; 430 U.S. at 287-89. A tax falling within the ambit of these cases is valid if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279. *See id.* at 287; 435 U.S. at 750-51. We need not decide whether a severance tax measured by quantity produced within a single jurisdiction falls within the ambit of this new doctrine. Obviously the questioned tax falls on activity — production — with a substantial nexus with the reservation. The tax does not raise the apportionment problem because it is measured by quantity, and as we have determined, it does not discriminate against interstate commerce. If the *Stevedoring* and *Complete Auto Transit* analysis applied, the only question is whether the tax is fairly related to services provided by the reservation. Lessees did not build a factual foundation in the record to challenge the tax on this ground, since they relied upon the rejected *per se* rule. Thus there is no basis on which to hold the tax invalid on this ground. *See* 435 U.S. at 750-51.

occupation or privilege tax on the mining or severing of natural resources, although closely connected with interstate commerce, is a local activity properly subject to local taxation. Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923). *See* Dunbar-Stanley Studios, Inc. v. Alabama, 383 U.S. 537, 541 (1969); Alaska v. Arctic Maid, 366 U.S. 199 (1961); Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927). This is true even though the severed product is destined for immediate entry into interstate commerce, Arctic Maid, 366 U.S. at 204; Oliver Iron Mining Co., 262 U.S. at 177-78, and even though the cost of interstate commerce is increased. Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 612 (1938). *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977). The Tribe's tax fits within this line of cases.

The clear thrust of the ordinance is that the taxable event is severance or bringing the resources to the surface. To be sure, the ordinance's phrase "severed, saved and removed from Tribal lands" is ambiguous, for the taxable event could be removal from the territorial boundaries of the reservation after severance. But we think the phrase "remove from Tribal lands" merely means removal from the soil, as the Tribe argues. This interpretation is reinforced by the explicit requirement that the taxes are due at the time of severance. Nor does the provision that the tax rate is to be applied to oil or gas "sold or transported off the Reservation," alter this conclusion. Although this phrase is also ambiguous, it would seem to mean the tax rate is applied to natural gas and oil that is sold on the reservation or transported off the reservation before sale. The only products not included in the tax computation are those used by the operators in the process of production and those received by the Tribe as royalty in kind. All other products are taxed at the time of severance.

The trial court also held the tax invalid as a multiple burden on interstate commerce, apparently because New Mexico imposes an oil and gas severance tax, as well as an oil and gas emergency school tax, an oil and gas conservation tax, and an oil and gas production equipment ad valorem tax. *See* N.M. Stat. Ann. §§ 7-29-1 to 7-29-22; *id.* §§ 7-31-1 to 7-31-25; *id.* §§ 7-30-1 to 7-30-26; *id.* §§ 7-34-1 to 7-34-20 (1978). The Supreme Court, in Western Live Stock v. Bureau, 303 U.S. 250 (1938), explained the basis for finding this type of violation of the Commerce Clause as follows:

> The vice characteristic of [local taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . *with equal right by every state which the commerce touches,* merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce.

Id. at 255-56 (citations omitted) (emphasis added). Applying this analysis, we hold the trial court erred.

We first note that the focus is upon the type of tax that every state may impose with equal right. It is beyond question that no state, with the exception of New Mexico, has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support levy of a severance tax on lessees' occupation. There is thus no threat of a multiple burden emanating from this tax unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause. That New Mexico may be able to impose an identical tax on lessees does not implicate the federal interest in maintaining the flow of

interstate commerce at all, we believe. Rather it raises two different questions — whether the *state's* tax interferes with the federal interest in regulating the affairs of the Indians, a question we do not reach, and whether a Congressional grant of authority to levy the state tax preempts tribal taxation, addressed in Part IV, *infra*.

We hold the federal interest in interstate commerce, manifested in traditional Commerce Clause analyses, does not limit the Tribe's power to impose this tax.

IV

We next consider whether Congress has preempted the exercise of the Tribe's power to levy the severance tax. The trial court held that by granting to the states the right to tax the production of oil and gas on executive order reservations, Congress intended to preempt similar tribal taxation. The basis of this ruling is 25 U.S.C. § 398c, which provides:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided*, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Emphasis in original). Section 398c was an integral element of the Act of March 3, 1927, ch. 299, 44 Stat. 1347, which also settled then unresolved questions concerning the status of Indian mineral rights in executive order reser-

vation lands and granted to the Indians all the royalty, rental and bonus income from oil and gas leases on their reservations. *See id.* § 2, 44 Stat. 1347 (codified at 25 U.S.C. § 398b). *See also* SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926).

In construing this statute, we must apply the

> "eminently sound and vital canon," *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649, 655 n. 7 (1976), that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78, 89 (1918). See *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912); *Antoine* v. *Washington,* 420 U.S. 194, 199-200 (1975).

Bryan v. Itasca County, 426 U.S. 373, 392 (1976). Fairly read, this statute does not by its terms preclude tribal taxation of lessees engaged in the business of producing oil and gas from within executive order reservations. Moreover, the legislative history, which reflects Congress' awareness of the need at that time for express authorization of state taxation of Indians and of non-Indians doing business with Indians on the reservation, does not show an express or implied intent to preempt tribal taxation. *See* H.R. REP. NO. 1791, 69th Cong., 2d Sess. 4 (1927); SEN. REP. NO. 768, 69th Cong., 1st Sess. (1926); H.R. REP. NO. 763, 69th Cong., 1st Sess. (1926); 68 CONG. REC. 4569-81 (1927); 67 CONG. REC. 10912-25 (1926); 66 CONG. REC. 2233-34 (1925); 66 CONG. REC. 998-99 (1924).

A careful reading of the legislative history convinces us that Congress simply did not think of the issue when it enacted the statute, even though the Supreme Court and the Eighth Circuit had approved tribal taxation of nonmembers under similar circumstances. *See* Part II, *supra.* There was dispute over whether the Indians should receive

all of the royalty income from leases of reservation lands. Legislators who opposed the Act as too generous might well have voted against giving the Indian tribes power to levy taxes, but the majority, who obviously thought that all benefits from the minerals on the reservations belonged to the Indians, might well have voted the other way. At no time when the state taxes were mentioned was there any discussion that the amount of such taxes might be relevant to passage of the Act. We therefore conclude that section 398c, being part of an act passed to benefit the Indians and ambiguous in letter and intent with respect to tribal taxation, does not preempt the tribal tax ordinance at issue in this case.[5]

It also may be argued that by virtue of its regulation of the leasing process, Congress preempted independent tribal taxation of those acquiring leases by that process. *Cf.* Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (all-inclusive federal regulations and statutes applicable to trading on the reservations with Indians preempt state taxation of traders doing business thereunder). In essence, the argument is that by prescribing the procedures for the acquisition of leases and determining

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[5] The Tribe also argues that New Mexico has no power to levy its severance tax on production within the reservation. Its argument in essence is that the General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g), which makes uniform the laws applicable to leasing of mineral rights on Indian reservations, and does not contain a specific grant of power to the states comparable to that found in the Act of March 3, 1927, ch. 299, § 3, 44 Stat. 1347 (codified at 25 U.S.C. § 398c), repealed the latter provision. See § 7, 52 Stat. 347. Because the State of New Mexico is not a party to this litigation and we hold the State's power to tax, if any, is not exclusive, we do not reach this question. For the same reasons we do not address the Tribe's contention that the trial court erred in not allowing the Tribe to put the leases into evidence to show whether they were granted under § 398c or under § 396a.

the royalty, bonus and rental payments the Indians are to receive, Congress intended that no burdens other than those embodied in the leases be imposed on the lessees.

When Congress first authorized leasing of land within executive order reservations for oil and gas purposes in the Act of March 3, 1927, ch. 299, § 1, 44 Stat. 1347 (codified at 25 U.S.C. § 398a), it provided that the same rules apply as for leasing oil and gas interests on other types of reservations. *See* 25 U.S.C. §§ 397, 398. Thus, the Secretary of the Interior, with the consent of the tribal council, was charged with the responsibility of conducting a public auction to obtain the best terms possible for the Indians. *See* 25 U.S.C. § 398. But in 1938 Congress effected a change in this scheme that is significant for our purposes. The General Leasing Act of 1938, ch. 198, 52 Stat. 347 (codified at 25 U.S.C. §§ 396a-396g), intended to make uniform the various laws applicable to the leasing of Indian lands for mining purposes and to conform the laws to the purposes of the Indian Reorganization Act of 1934, §§ 16, 17, 25 U.S.C. §§ 476,477. *See* H.R. REP. NO. 1872, 75th Cong., 3d Sess. (1938). Therefore, it elaborated on the procedures to be followed for leasing oil and gas interests. But of greater significance is the proviso found in that section, which allows tribes organized and incorporated under 25 U.S.C. §§ 476, 477 to assume and define for themselves the leasing process.[6]

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[6] 25 U.S.C. § 396b provides:

> Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sale to the highest responsible qualified bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the

Thus, Congress expressly provided that tribes like the Jicarilla Apache Tribe may, by proper constitutional and legislative means approved by the Secretary of the Interior, *see* 25 U.S.C. § 476, determine the terms upon which they will lease their lands and regulate the operations of their lessees.[7] Under these circumstances we cannot conclude that Congress intended to so occupy the field of regulating leasing of tribal property for oil and gas leases that the Tribes could not impose additional burdens on lessees through exercise of the power of taxation.

The leases themselves contain a provision that no change may be made in the rate of "royalty or annual rental" without written consent of the parties to the lease. But as lessees acknowledged at oral argument, such a provision does not preclude a sovereign that is also a lessor from imposing a tax which has the practical effect of increasing

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lease, or the Secretary of the Interior shall determine that it is unwise in the interest of the Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: *Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 476 and 477 of this title, to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to sections 461, 462, 464-475, 476-478, and 479 of this title.* (Emphasis added).

[7] The Secretary of the Interior has implemented by regulation the substance of the proviso as follows:

> The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), . . . or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

25 C.F.R. § 171.29 (1979).

its revenues. It is well settled that such an agreement does not prevent the exaction of a license tax "unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation." City of St. Louis v. United Rys. Co., 210 U.S. 266, 280 (1908). *See also* New Orleans City & Lake R.R. v. City of New Orleans, 143 U.S. 192 (1892).

We have considered the remaining contentions of the parties and do not find them to be dispositive.

The judgment of the trial court is reversed and remanded with direction to enter judgment in favor of appellants.

Nos. 78-1154 and 78-1251

J. GREGORY MERRION, et al. v.
JICARILLA APACHE TRIBE, et al.

McKAY, Circuit Judge, concurring:

While I concur fully in the opinion of the court, I file this statement to emphasize certain considerations dictating the result reached.

As the dissenting opinion of the Chief Judge suggests, the time in history at which one begins his analysis certainly does affect the outcome. For the most complete examination, we should begin in pristine times, or at the very latest with 1788 and the ratification of our fundamental law. At that moment there were at least four, not three, entities recognized by the Constitution. There was, of course, the federal government. There were, of course, the states. There were, of course, foreign nations. And there were "the Indian Tribes."[1]

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[1] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. Const. art. 1, § 8.

Beginning with the ratification of the Constitution, it is essential to examine both the actual dealings with the tribes and the language employed in those dealings in order to comprehend the tribes' special status. Even the conquering government characterized them as "nations." The early Supreme Court decisions incorporate those national concepts as, for instance, in *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), where Chief Justice Marshall wrote: "[A] weaker power does not surrender its independence — its right to self government, by associating with a stronger and taking its protection." *Id.* at 561. Both the language and formality of treaties were employed in defining the tribes' special status. Indeed, "[t]he Indian tribes were recognized as powers capable of making treaties before the United States was." F. Cohen, *Handbook of Federal Indian Law* 274 (1942).

The source of cession of Indian lands is of relatively little consequence. Whether the lands came from the exaggerated claims of dominion asserted by France, Spain, Russia or Mexico, our government continued to treat the Indian tribes with the same essential assumptions. For example, the President negotiated and the Senate ratified a treaty with the Mescalero Apaches — a nation of Indians living within the land ceded by Mexico — only four years after the Treaty of Guadalupe Hidalgo. *See* Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852). In no sense, then, were all vestiges of governmental power abolished in the New Mexico tribes. Thus, we see that the Indians were never treated as mere corporations, mere landholders or mere associations. While it is true that Congress did not formally ratify the proposed treaty with the Jicarilla, that fact does not derogate from the general underlying assumptions about the tribe's historic status. A congressional failure to ratify a treaty does not convert a "nation" into a voluntary association. The

profile of the tribe's rights, practices and relationships under federal authority properly reflects a status similar to the tribes whose proposed treaties were indeed ratified. "Executive order reservations have exactly the same validity and status as any other type of reservation." F. Cohen, *Handbook of Federal Indian Law* 299 (1942) (citing 34 Op. Att'y Gen. 181, 186-89 (1924)).

Tribes have characteristics of sovereignty not enjoyed by the kinds of proprietary and fraternal bodies which the Chief Judge asserts are most analogous to the tribes. If we were to deny the importance of sovereignty in our analysis, we would be ignoring the clear dictates of the Supreme Court. *See, e.g., Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 172 (1973). Indeed, the Court has consistently held the tribes to have the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58.

Indian "self-determination" is not in substance the same as that of any voluntary association. *Congress* has explicitly "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a) (1976). And the principle of self-determination may be said to *require* protection of territoriality. *See* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating Tribal, State, and Federal Interests,* 13 Harv. C.R.-C.L. L. Rev. 357, 390 & 390 n.154 (1978).

Even though *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), shies away from the prospect of non-Indians answering to Indian tribunals for *criminal* behavior, it nonetheless confirms that tribes enjoy sovereign powers not remotely granted to corporations, voluntary associa-

tions, and the like. *Id.* at 208. Those powers may be subject to divestiture by the superior federal power, but such divestiture is implied only if the powers are inconsistent with the tribes' status. *Id.* In a limited area, *Oliphant* found divestiture, but "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes,* 54 Wash. L. Rev. 479, 508 (1979). Tribes clearly do have governmental authority over nonmembers in many instances. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 65. *See United States* v. *Mazurie,* 419 U.S. 544 (1975); *Williams* v. *Lee,* 358 U.S. 217 (1959).

The reservation tribes, including the Jicarilla, typically and with congressional approval have operated as governments. There can be no doubt that the federal government, because of the special authority granted it in dealing with the Indians, has the power either to confirm in them or to grant to them typical municipal powers whether they be police powers, regulatory powers or fiscal powers. It simply does not make sense to expect the tribes to carry out municipal functions approved and mandated by Congress without being able to exercise at least minimal taxing powers, whether they take the form of real estate taxes, leasehold taxes or severance taxes. Such taxes certainly do not offend the concerns expressed in *Oliphant* because historically and conceptually these taxes are associated with land, even though the impact may ultimately fall on individuals, Indian or non-Indian.

Finally, because the case is so often cited, I think it important to emphasize that *Puyallup Tribe, Inc.* v. *Depart-*

ment of Game, 433 U.S. 165 (1977), provides no authority whatsoever for the State of New Mexico to assert jurisdiction over Indian reservations. The Chief Judge correctly notes that the case upheld the right of the State of Washington to regulate the netting of steelheads by individual Puyallup Indians. However, unlike New Mexico, Washington had explicitly asserted Public Law 280 "civil and criminal jurisdiction within the [Puyallup] reservation for most purposes." *Id.* at 175, 175 n.14. In addition, in contrast to the Jicarilla reservation, the Puyallup reservation has ceased to exist for all practical purposes. The Puyallups have alienated all but 22 acres of their 18,000 acre reservation, and none of the remaining 22 acres abuts on the river in question. *Id.* at 174. Furthermore, although the Jicarilla Apaches have not done so, a tribe may voluntarily relinquish some of its jurisdictional rights. In *Puyallup Tribe,* the Court interpreted the relevant treaty as permitting state regulation. *Id.* at 175.

No. 78-1154

J. GREGORY MERRION, et al. v.
JICARILLA APACHE TRIBE, et al.

No. 78-1251

AMOCO PRODUCTION COMPANY, et al. v.
JICARILLA APACHE TRIBE, et al.

SETH, Chief Judge, dissenting:

I must dissent from the majority opinion for several reasons.

I would begin the analysis of the issues presented in this appeal at a very early date to place the matter in its historical context. Thus, in my view, the consideration of this appeal should *not* start with an analysis of "sover-

eignty," as the Secretary urges, as this includes too many assumptions and generalizations which are questionable but which nevertheless influence the outcome. As so often happens when a start is made too far along the sequence of events or the development of doctrines the selection of a place to start determines where the writer is going to come out. Thus I would start instead with an examination of the fundamental relationships as they existed initially between the federal government and the Jicarilla Apaches, and this relationship as influenced by the creation of the State of New Mexico.

The Jicarilla Apaches were then and now are in the area ceded to the United States after the war with Mexico. The Treaty of Guadalupe Hidalgo with Mexico in 1848 (9 Stat. 922) contained provisions for the recognition of land titles, and the proprietary interests of the citizens of Mexico within the area ceded. No separate mention is therein made of Indian lands or any recognition given to Indian groups other than border problems. These groups had been under the rule of Spain and of Mexico for two hundred years. They were in an area settled by Spain and Mexico and in frequent contact over the years. The Pueblo Indians had received grants of land as had non-Indian groups. The Treaty treats all persons within the ceded area in the same way. The Treaty of Guadalupe Hidalgo thus spoke for all persons within the geographical area concerned, as would any treaty. There was no separate treatment of particular areas or groups and there was no reason why there should have been. All persons had been subjects of the Spanish crown and the government of Mexico for several hundred years. The sovereignty was thus *transferred* from the government of Mexico to the United States. This was not an area being occupied by the first foreign sovereign to come on the scene wherein it would be expected

that the various groups of inhabitants would be dealt with separately or differently. Instead it was the conclusion of a war between two nations one of which, with its predecessor, had exercised complete authority and sovereignty over the land and all the people for several hundred years. With the end of the war and the peace treaty all the persons in the ceded area who stayed automatically came under the complete authority of the United States. They were thereby transferred from one sovereign to another. The citizenship issues have been treated by a number of authorities and need not be considered here because there is no question as to the complete authority of the new sovereign over all the people as a consequence of the Treaty with Mexico and the position as a successor.

At the end of the Spanish occupation there were in New Mexico and Arizona some six or eight independent Apache tribes. One of these was the Jicarilla Apaches. In 1846 after the period of Mexican sovereignty the Jicarillas numbered about 500 according to Governor Bent. There were then in all ten to twelve groups, each consisting of eight to ten family units, with a total of about forty-five individuals. Albert H. Schroeder, *Apache Indians I* (Garland Publishing Co. reprints, reports and exhibits) [hereinafter cited as Schroeder]. The basic unit was the family group. There were no clans or gentes, M. E. Opler, referring to the Jicarillas (as quoted by Schroeder), writes:

> "The Tribe was a rather nebulous entity of its members. The band was a man's immediate concern.
>
> . . . .
>
> "They were semi-nomads, following wild food harvests.
>
> . . . .
>
> "The people living in one section of the tribal range would seldom meet their tribesmen of a more distant quarter."

Opler also writes that the local groups would form a loose confederation for social purposes, and for defense or aggression. When the small units banded together for war a leader was accepted by agreement, but each individual was free to come or go at will or reject the leader (Schroeder). As early as 1796 Colonel Don Antonio Cordero, as to all Apaches, reported (per Schroeder): "At present they do not compose one nation of uniform customs, usages and tastes." There was, of course, no central authority for the Jicarillas at any time. Each autonomous group would winter around their geographic landmark near the Sangre de Cristo Mountains, and in summer move about with the availability of food, and move eastward to hunt buffalo. These groups used an area of some 5,000 to 7,000 square miles. *See generally* H.R. Rep. No. 2503 (1953). There was thus self-determination within the socio-religious-family relationships. This went with the small groups wherever they went as it had no geographical significance nor relationship to any other group. There were several small groups who farmed near Taos and Cimarron. For descriptive purposes the Spanish referred separately to the eastern groups, the Sand group, and the more western group. An eastern group leader was dealt with for a time in the pre-American period.

The Treaty of Guadalupe Hidalgo and the American occupation necessarily displaced all existing authority in the area, and there were then created the only governmental entities in New Mexico which were to exist during the interim period. Thus a new government came on the scene to supplant entirely the old. This was not an unfamiliar event in the history of the world.

Thus with the substitution of the government of the United States for the government of Mexico all the individuals in the area started anew with only their property.

Thus there is nothing to build on in New Mexico to create a concept of sovereign power in any group remaining from Spanish or Mexican times. The start is from a zero base with the American occupation for all persons in the area. This new structure was established by the code promulgated by General Kearney in September of 1846. It was a complete code of laws and created the framework of the government with many details. Thus there were no vestiges preserved of any governmental powers whatever in the Indian groups in New Mexico who did not occupy pueblos. The Jicarilla Apaches had no such powers over others, and if they had any they would have been lost by the American occupation.

The act organizing the territory of New Mexico was effective in September of 1850 (9 Stat. 446). This was a skeleton of organization and contained no mention of land ownership nor of the Indians. This was followed by the Enabling Act for the State of New Mexico (36 Stat. 557, Act of June 10, 1910). This Act contains the first reference to the Indians as a group. This Act recognized them only as landowners or possible landowners. The Act as to non-Indians provides in part that "people inhabiting said proposed state" disclaim all proprietary claims to the lands of the United States and of the Indians. The Act also acknowledges the exclusive jurisdiction in Congress over Indian lands. This disclaimer is by the "people" and only of *proprietary* interests. It has nothing to do with a disclaimer of sovereign power of the state, and again relates only to lands in an attempt to retain the status quo, and the rights under the Treaty of Guadalupe Hidalgo.

The Enabling Act, of course, contemplated the creation of a state under the United States Constitution with the vesting of broad powers in the new state. The Constitution

contemplates that the states are to create within their boundaries the counties, parishes, cities and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government under its residual powers retained no authority to create governmental bodies within the states. The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundation of governmental authority as it exists in the United States. Not only are there no federally created governmental entities within the states provided for by the Constitution, but it also does not contemplate the existence of other "nations" within the boundaries of the United States. Obviously there is no place for them in the governmental structure therein created.

It is significant in this respect that the Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, quoted from United States v. Kagama, 118 U.S. 375, the following:

> " 'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . . exist in subordination to one or the other of these.' "

As to the Jicarillas, long after the American occupation legislation began to fill the vacuum as to their internal matters, their relation with the federal government and New Mexico, their money, and their tribal businesses, but all within Constitutional limitations. The place or location in New Mexico to be occupied by the Jicarillas after the American occupation changed several times. There were a series of executive orders promulgated and revoked. Fin-

ally, a location was established and the Executive Order recites that a described tract is "set apart as a reservation for the use and occupation of the Jicarilla Apache Indians." This is obviously something other than "ownership" but for our purposes it is no different from any other real estate "owned" by an individual or a group. It is no different from the Spanish and Mexican community land grants existing and recognized in New Mexico from the earliest times. These grants are also managed, used, and owned by groups in a community. The combination of land ownership and self-determination for anyone does not add up to anything more than the elements separately considered. The combination does not create a governmental agency or entity recognized or contemplated by the Constitutions of the United States or of New Mexico.

The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on tribal membership. Perhaps this is as it should be for self-determination; however, such a group of tribal members excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on representation with an opportunity to participate. When this is provided authority exists to govern. Here we cannot add the exclusive group self-determination to land ownership and come out, as to the outsiders, with anything more than the rights of a private landowner. "Self-determination" for such an exclusive group is in substance what any socio-religious group has in this country, and should have. If such group owns a tract of land, there is the same combination of self-determination and private property which again adds up to private property as to non-members. This is typical of community land grants in New Mexico.

The added element as to the Jicarillas is the control by Congress and the limited land "ownership." These for all practical purposes must be negative elements.

The plenary power of Congress over the Indians and their lands is obvious, but it must be recognized as a power "over the Indians" and not a power over non-Indians. The power of Congress over the Indians and their lands cannot include the exercise of such power to diminish the rights of non-Indians. To do so is to exercise plenary power over non-Indians. Thus Congress cannot under the Constitution add sufficient elements or powers to such an exclusive tribal group any more than it can to any other socio-religious group which would enable the members to exercise governmental powers of any nature in New Mexico.

The Secretary here urges that the Reorganization Act added some new ingredient of a governmental nature. Under the Constitution Congress cannot add new governmental entities in New Mexico not theretofore provided for. The federal government cannot by the Reorganization Act or by any other method introduce "nations" or governmental entities within the state. The Reorganization Act is an aspect of the current policy of the federal government seeking to cast self-determination machinery in a form in which it is accustomed to, and which has a "governmental" appearance. The whole concept of self-determination should be taking place and should have been advanced in years past. All must agree that it is most desirable, and to be valid it must be recognized for what it really is — "self-determination."

It is a mistake to generalize about "Indian rights," wherever the groups may be in the United States, and to disregard the events in their history, in the history of the states where they may now be located, and the events and sequence of such events in the history of the United States.

The differences are too great to permit the broad generalizations which are urged on this appeal by the Government or the basic assumptions made therein.

The State of New Mexico under specific federal statutes and under its sovereign powers has extensive jurisdiction within Indian reservations which it may choose to exercise or not to do so. The Supreme Court in Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, considered and upheld the right of Washington State to control the netting of steelheads by individual Indians within the Puyallup Tribe's reservation. *See also* Kake Village v. Egan, 369 U. S. 60.

The Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, referred to the many instances where the Court has referred to the limited authority retained by Indian tribes. The Court therein refers to the "quasi-sovereign" reference in The Cherokee Nation v. Georgia, 5 Pet. 1, and then states:

> "But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers *'inconsistent with their status.'"* (Emphasis supplied.)

The Court also refers therein to Johnson v. M'Intosh, 8 Wheat. 543, and stated that:

> "We have already described some of the inherent limitations on tribal powers that stem from their incorporation into the United States."

The Court continued:

> "Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power

> to transfer lands or exercise external political sovereignty. In the first case to reach this Court dealing with the status of Indian tribes, Mr. Justice Johnson in a separate concurrence summarized the nature of the limitations inherently flowing from the overriding sovereignty of the United States as follows: '[T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors [to the United States] from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*'" (Emphasis supplied.)

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, is a significant decision by the Supreme Court. It is, of course, directly concerned with the authority of an Indian tribe to exercise criminal authority over a nonmember. The decision, however, carries a parallel analysis and statement of reasons applicable to jurisdiction or power by the Indians over all matters relating to nonmembers. We have above referred to portions of the opinion and the references to other Supreme Court opinions therein contained. The decision represents, together with United States v. Wheeler, 435 U.S. 313, a description of Indian "sovereignty" after all its restrictions and limitations are applied, as authority over members of the tribe. This is "self-determination" as it now exists. The Court in *Wheeler* said:

> "It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain 'a separate people, with the power of regulating their internal and social relations.' *United States* v. *Kagama, supra,* at 381-382; *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16."

In a footnote to the above, the Court added:

> "Thus, unless limited by treaty or statute, a tribe has the power to determine tribe membership, *Cherokee*

Intermarriage Cases, 203 U.S. 76; *Roff* v. *Burney,* 168 U.S. 218, 222-223; to regulate domestic relations among tribe members, *Fisher* v. *District Court,* 424 U.S. 382; *cf. United States* v. *Quiver,* 241 U.S. 602; and to prescribe rules for the inheritance of property. *Jones* v. *Meehan,* 175 U.S. 1, 29; *United States ex rel. Mackey* v. *Coxe,* 18 How. 100."

The Court in *Wheeler* continued:

"The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."

And again:

"The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe."

And again:

"These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status. '[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self government, by associating with a stronger, and taking its protection.' "

These quotations are especially significant when we consider the history of the Jicarillas, and the zero base from which they started into the American occupation. Even in United States v. Mazurie, 419 U.S. 544, the Court referred to the tribe there concerned as possessing "a certain degree of independent authority over matters that affect the internal and social relations of tribal life."

The two principal cases considered — *Oliphant* and *Wheeler* —, of course, concerned criminal jurisdiction, but again the reasoning and analysis upon which the decisions are based is equally applicable to other "jurisdiction" or "powers" over nonmembers which would originate with any concepts of governmental status or an aspect of sovereignty. *See also* Puyallup Tribe v. Washington Game Dept., 433 U.S. 165. These several recent decisions, in my view, are determinative of the issue on appeal.

Thus under the most recent cases "Indian sovereignty," if it may be generalized, means self-determination. It means the right of the Jicarillas to control their internal business-governmental affairs relating to tribal members and, of course, their social and religious affairs. This is added to the usual rights which accompany the ownership of property both real and personal. These rights taken together do not include the taxation power here sought to be exercised. In contrast to the many license cases cited by the parties, if there is a license it is the executed oil and gas lease. The tribe is as any other landowner in relation to the lease for the purposes under consideration.

I would thus affirm the trial court.

Nos. 78-1154 and 78-1251

MERRION, et al. v. JICARILLA APACHE TRIBE and ANDRUS, SECRETARY.

BARRETT, Circuit Judge, dissenting:

I.

In *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116, (10th Cir. 1979), we discussed the unique relationship between the United States Government and the Indian Tribes:

> Since the year 1871, Indian tribes have been subject to the power and authority of the laws of the United States by means of the exercise of its legislative power over them. Prior thereto the various tribes were recognized by the United States as possessing the attributes of separate nations to the extent that treaties were entered into with them. Thus, since 1871 the Congress has regulated Indian affairs and the United States government serves as guardian of the Indian tribes, nations, or bands. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 23 S.Ct. 115, 47 L.Ed. 183 (1902). It has been said that, in a general way, the relationship now between the United States government and the Indian tribes is that of superior and inferior, in that the government has assumed, in large measure, the care and control of Indians and Indian Tribes. *Montoya* v. *United States,* 180 U.S. 261, 21 S.Ct. 358, 45 L.Ed. 521 (1901). The paradox, so to speak, is that even though Indian tribes have been held to have a [sovereign] status higher than the states they are nonetheless limited in sovereign power to the extent required of them by the superior sovereign, the United States. *Native American Church* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959).
>
> Congress possesses paramount power over the property of the Indians by reason of its exercise of guardianship over their interests. Thus, plenary au-

> thority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one not subject to the control of the judicial branch of government. *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 23 S.Ct. 216, 47 L.Ed. 299 (1903). The propriety or justification of action by the Federal Government, legislatively mandated, relative to Indian lands and properties is a political rather than a judicial question and that power is plenary. *Oneida Indian Nation* v. *County of Oneida, supra; United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941).
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> It is within the power of the Congress to provide that the laws of a state shall extend over and apply to Indian country and activities thereon, where they clearly do not interfere with federal policies concerning the lands. *Warren Trading Post Co.* v. *Arizona Tax Commission,* 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962).
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> 601 F.2d at pp. 1125, 1126.

In the exercise of the elusive concept of "tribal sovereignty", the courts have been able to readily define the limits thereof only if a federal statute or treaty speaks directly to the subject, i.e., the power of an Indian tribe to exercise a particular jurisdiction. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); *Bryan* v. *Itasca County, Minnesota,* 426 U.S. 373 (1976). Thus, any general federal law fails if it conflicts with or abrogates a tribal treaty right. *United States* v. *Winnebago Tribe of Nebraska,* 542 F.2d 1002 (8th Cir. 1976). The two primary sources of explicit limitations on tribal sovereignty or political independence are treaties and federal legislation dealing with Indians; the Tribes do, however, retain those aspects of "sovereignty" not withdrawn. *United States* v. *Wheeler,* 435 U.S. 313 (1978).

Indian treaties have not been interpreted narrowly, but have been construed so as to generously recognize the full obligation of the United States to protect the interests of a dependent people. *Peoria Tribe of Indians of Oklahoma* v. *United States,* 390 U.S. 468 (1968). Accordingly, all doubtful expressions contained in treaties should be resolved in the Indians' favor, *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), although the Congress has exclusive plenary legislative authority over Indians and all of their tribal relations. *Lone Wolf* v. *Hitchcock, supra.*

In the instant case there are no treaty rights involved, inasmuch as the Jicarilla Apache Tribe Reservation was carved out of the public domain and withdrawn by Executive order. A tribe occupying lands under a treaty has rights which are contractual in nature; however, a tribe occupying reservation lands by virtue of an Executive Order does so at the will of the Congress. Under either circumstance, i.e., creation of Indian reservations by treaty or Executive order, the exclusive plenary legislative authority of the Congress is superior *when exercised.* The "jurisdictional" problem relating to the applicable law of "Indian country" was discussed in *Washington* v. *Yakima Indian Nation,* 439 U.S. 463 (1979).

> Before the enactment of the state law here in issue, the Yakima Nation was subject to the general jurisdictional principles that apply in Indian country in the absence of federal legislation to the contrary. Under those principles, which received their first and fullest expression in *Worcester* v. *Georgia,* 6 Pet. 515, 517, state law reaches within the exterior boundaries of an Indian reservation only if it would not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *Williams* v. *Lee,* 358 U.S. 217, 219-220.7. As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, *Moe* v. *Salish &*

> *Kootenai Tribes,* 425 U.S. 463, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has "expressly provided that State laws shall apply." *McClanahan* v. *Arizona State Tax Comm'n.,* 411 U.S. 164, 170-171.
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> 439 U.S. at pp. 470, 471.

The Congress, of course, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of Indian tribes. *United States* v. *Wheeler, supra.* This power was articulated in *United States* v. *Mazurie,* 419 U.S. 544 (1975).

> This Court has recognized limits on the authority of Congress to delegate its legislative power. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935). Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 319-322 (1936). Thus it is an important aspect of this case that Indian Tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations. . .," *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n.,* 411 U.S. 164, 173 (1973).
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> . . . [*W*]*hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.* [Emphasis supplied].
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> 419 U.S. at pp. 556, 557.

The Supreme Court has recognized that Indian Tribes have separate, distinct rights of self determination con-

stituting them "quasi-sovereign tribal entities." *United States* v. *Wheeler, supra; Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). These rights flow from the historical recognition of tribal political independence in the context of tribal-federal relations first declared in *Worcester* v. *Georgia, supra,* which involved the applicability of certain statutes enacted by the State of Georgia relative to reservation lands of the Cherokee Tribe. The Court held that the State statutes were not enforceable. While recognizing that Indian tribes are independent political communities possessing attributes of sovereignty over both their members and their territory, the Court nevertheless placed particular significance on the fact that the Constitution vested full control of Indian affairs in the Federal Government. In my view, the exclusivity of "control" indicated in *Worcester, supra,* was modified at least interpretive-wise, by subsequent Supreme Court decisions which recognized the power of the states in specific areas over Indians and reservation lands providing that the power exercised does not infringe on the tribal powers of self-government which are part of the doctrine of tribal sovereignty, and, thus, those "inherent powers of a limited sovereignty" referred to in *United States* v. *Wheeler, supra.*

Applying the foregoing test, I conclude that it is incumbent upon the courts, on a case-to-case basis, to carefully scrutinize the power to be exercised in terms of the intended purpose and the interest to be served. Neither treaties or statutes dealing with Indian affairs relate or "speak" to many of the "jurisdictional" conflicts which have surfaced.

If statutes and treaties provide clear guidance relative to Congressional intent, no further inquiry is required. Thus, in the very area of our inquiry here (the power of the Indian Tribes to tax non-members on the Reservation lands) there are decisions upholding tribal tax assessments

authorized by treaties, statutes or agreements with the United States. In *Morris* v. *Hitchcock,* 194 U.S. 384 (1904), the Supreme Court upheld an act of the Chickasaw Nation imposing an annual per head privilege or permit tax on cattle and other animals owned by a non-Indian who was grazing animals under a lease on the Reservation lands. The Court specifically found the tax assessment to be authorized under both the terms of treaties entered into with the Five Civilized Tribes, and the Curtis Act. In *Buster* v. *Wright,* 135 F. 947 (8th Cir. 1905) the Court upheld a "permit tax" imposed by the Creek Indian Nation in the nature of a percentile levy on all goods offered for sale by non-member traders doing business on the Reservation lands. The Court relied upon *Morris* v. *Hitchcock, supra,* and *Crabtree* v. *Madden,* 54 F. 426 (8th Cir. 1893) in upholding the tax, i.e., the existence of the power and authority granted the Tribe under treaties and acts. Even so, the court did opine that in the absence of an Act of Congress, treaty or agreement with the United States, the Creek Nation would be empowered to impose the tax as ". . . one of the inherent and essential attributes of its original sovereignty." In *Crabtree* v. *Madden, supra,* the Court upheld an annual license tax of $200.00 assessed by the Creek Nation against non-member traders doing business on the Reservation based upon the power and authority reserved to the Tribe under the Treaty of August 7, 1856, 11 Stat., p. 703, Art. 15, which granted the Creeks the unrestricted right of self-government with full jurisdiction over persons and property within their limits. The Treaty provided that all persons not members of the Tribe were to be regarded as "intruders" subject to removal unless traveling through or "trading therein under license".

If, then, there are no treaties, statutes and agreements granting such power, the courts have been compelled to engage in the "balancing of interests" process. In this

circumstance, the Supreme Court has recognized that non-Indians and their property interests within Indian reservations are subject to licensing enactments or ordinances. *United States* v. *Mazurie, supra,* involved the inherent power of the Tribe to grant or deny a liquor license to a non-Indian liquor dealer operating a retail business on non-Indian lands within the boundaries of the reservation. In like manner, tribal hunting and fishing licenses governing non-members who enter the reservations to hunt and fish have been grounded upon the inherent powers of the Tribe. *Quechan Tribe of Indians* v. *Rowe,* 531 F.2d 408 (9th Cir. 1976).

There are other areas where courts have been compelled to engage in the balancing of interest process. Thus, in *Puyallup Tribe, Inc.* v. *Washington Game Department,* 433 U.S. 165 (1977), the State of Washington's conservation regulations dealing with an allocation of the total number of steelhead fish which could be netted by the Indians on the waters flowing through reservation lands was upheld as a proper conservation measure and not as an attempt to allocate the number of fish which could be netted by the tribe. To the same effect is *Organized Village of Kake* v. *Egan, supra.* The Court there upheld the State of Alaska's prohibition against the Thlinget Indians' use of salmon traps on waters flowing through the incorporated communities, notwithstanding Alaska's disclaimer in its Alaska Statehood Act relating to Indians, to-wit: (a) disclaimer of right and title to Indian property, and (b) recognition that the United States retains "absolute jurisdiction and control" over right and title of Indian property. *Enriquez* v. *Superior Court,* 565 P.2d 522 (Ariz. Ct. App. 1977) held that a tribal court had jurisdiction in tort cases involving actions brought by a non-member against a tribal member resulting from an accident occurring on the reservation.

The Supreme Court has dealt with the "balancing of interests" problem in very few decisions. In *Oliphant* v. *Suquamish Indian Tribe, supra,* the Court held that Indian tribes lack criminal jurisdiction over non-members in the absence of specific Congressional authorization. The Court observed, *interalia:*

> Indian reservations are "a part of the territory of the United States." *United States* v. *Rogers,* 4 How. 567, 571 (1846). Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority . ." *Id.,* at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. "[T]heir rights to complete sovereignty, as independent nations [are] necessarily diminished." *Johnson* v. *M'Intosh,* 8 Wheat. 543, 574 (1823).
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> 435 U.S. at pp. 208, 209.

The Supreme Court, in *Organized Village of Kake* v. *Egan, supra,* following a review of a number of its prior decisions in this area of concern, observed:

> These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law.
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> 369 U.S. at p. 75.

The problems generated by the issue of the "exclusiveness" of federal jurisdiction were highlighted by this language contained in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973).

> . . . The upshot [of more individuality in treatment of certain treaties and specific federal statutes, including statehood enabling legislation as they, taken to-

> gether, affect the respective rights of states, Indians and the Federal Government] has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. *Organized Village of Kake, supra* at 75; *Williams* v. *Lee,* 358 U.S. 217 (1959); *New York, ex. rel. Ray* v. *Martin,* 326 U.S. 496, 499 (1946); *Draper* v. *United States,* 164 U.S. 240 (1896).
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> 411 U.S. at p. 148.
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> *See also: United States* v. *Mazurie, supra.*

I would hold that the District Court did not err in finding that the Tribe's sovereign status does not extend to or allow the imposition of the challenged Tribal Severance Tax. In my view, the power of the Tribe to impose such a tax in these consolidated cases is clearly a political question which has not been explicitly addressed by the Congress. If the Congress intends that such power exists, it is incumbent that legislation be enacted explicitly so declaring. Until or unless the Congress affirmatively acts, I would hold that Tribe does not possess the right, power and authority to enforce the collection of its Tribal Severance Tax. My research discloses only two opinions which recognize the *inherent power* of an Indian tribe to enact and enforce a tribal ordinance assessing a tax upon a non-Indian's income from business conducted within reservation boundaries. *Barta* v. *Oglala Sioux Tribe,* 259 F.2d 553 (8th Cir. 1958) *cert. denied* 358 U.S. 932 (1959); *Iron Crow* v. *Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). I decline to adopt the broad interpretation of inherent tribal sovereignty—power laid down in these opinions, and adopted by the majority here.

A significant aspect of the issue before us here involves recognition that the United States Government, as guar-

dian, has enacted much legislation and appropriated significant amounts of federal funds for the direct, specific and exclusive benefit of its Indian wards. In like manner, the various states wherein the tribes reside have rendered state governmental aid and assistance in many important areas, utmost of which is perhaps the maintenance of the public schools. To what extent the Congress intends its beneficial enactments and appropriations to serve as exclusive means, I do not know. It is, however, my view that this involves a legislative judgment in the nature of a political question. The question of what involves "essential tribal relations" referred to in *Williams* v. *Lee, supra,* is, in my judgment a political question.

In positing the "inherent sovereignty" issues presented here as a political question for Congressional determination, we recognize that the United States Government, out of avowed solicitude for the welfare of its Indian wards who were considered ". . . . a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith," *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912), undertook by treaties, statutes and executive orders to establish legal relations between the United States Government and the Indian Tribes which ". . . resembles that of a ward to his guardian." *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 17 (1831). Implicit in the relationship thus created, in terms of "ownership" of the property set aside for the use, occupancy and benefit of the Indian tribes, is the fact that legal title, with its attendant aspect of dominion and ultimate control, vests in the United States, as guardian, with the right of use, benefit and occupancy vesting in the Indian wards. That relationship between the United States Government and the various Indian tribes, however, was never intended to be one of Indian servitude. Thus, the Supreme Court has held that

the power of Congress over Indian affairs, though plenary in nature, is not absolute and that the standard of review recently applied is that legislative judgments should not be disturbed "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Delaware Tribal Business Committee* v. *Weeks,* 430 U.S. 73, 85 (1977); *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974).

The "Indian Sovereignty" doctrine cannot be equated with governmental sovereignty of the United States Government. It is, however, of a "unique and limited character" existing at the sufferance of Congress and subject to complete defeasance. *United States* v. *Wheeler, supra,* at p. 323. Tribal self government is rooted in the current federal policy of promoting tribal self-government, *Bryan* v. *Itasca County, Minnesota, supra,* which advances the social, institutional, political and cultural values peculiar to the respective tribes. The basic right of Indian internal self-government is directed to their right "of regulating their internal and social relations," out of recognition of their "semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people." *United States* v. *Kagama,* 118 U.S. 375, 381 (1886).

II.

In the context of the above analysis of the current federal policy, I now consider the status of Congressional judgment in the area of the challenged Tribal Severance Tax in weighing the preemption contention against the claim of inherent tribal sovereignty. If the Congress has explicitly addressed the subject matter, obviously there is no need for this Court to engage in the "balancing of interests" determination.

In my view, just as found by the District Court, there is clear congressional intent controlling in this case. I would hold that the enactment by the Congress on March 3, 1927, of 25 U.S.C.A. § 398c., 44 Stat. 1347, constituted clear, unambiguous legislative intent that only a "state or local authority" is empowered to levy and collect taxes upon the production from oil and gas wells produced and saved *"upon lands within Executive order Indian reservations."* That statute imposes one restriction only, i.e., that such taxes may not become a lien against Indian lands or property. The statute reads in full as follows:

> § 398c. Same; taxes
>
> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided,* that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Tribe and the Secretary of the Interior contend that 25 U.S.C.'s § 398c. does not pertain or control. They argue, first, that Tribe, as an element of its sovereign status, is empowered to enact and enforce its severance tax ordinance and, second, that the Congressional enactment on May 11, 1938, of 25 U.S.C.A. § 396a. specifically governs the subject leases (and production therefrom) and does not permit state taxation of oil and gas produced within the Tribe's reservation. That statute reads as follows:

§ 396a. Leases of unalloted lands for mining purposes; duration of leases.

On and after May 11, 1938 unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those specifically excepted from the provisions of this section by section 396f of this title, may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities. May 11, 1938, c. 198 § 1, 52 Stat. 347.

I cannot accept the contentions of Tribe and the Secretary, with full recognition of the rule that limitations on tribal self-government cannot be implied from a statute or treaty but must be *expressly* stated or otherwise made clear from surrounding circumstances and legislative history. *Bryan* v. *Itasca County, Minnesota, supra; Morton* v. *Mancari, supra.* My review of the legislative history of 25 U.S.C.A. 398(c) convinces me that the Congress did intend to grant States and local authorities the *exclusive* authority to tax non-Indian oil and gas lessees on production realized from their oil and gas operations conducted on Executive order Indian reservation lands. It has been held that Indian tribes are not "states". *Native American Church* v. *Navajo Tribal Council,* 272 F.2d 131 (10th Cir. 1959); *Barta* v. *Oglala Sioux Tribe, supra.* The Congressional discussions and debates relating to this legislation concentrated on the fact that Executive order reservation lands were not in the same category as those lands set aside under treaty to a tribe which "gave up" or "surrendered" ancestral or aboriginal rights in exchange therefor, but were, instead, simply set aside as a "gratuity" to the tribes from the United States. In the sense of the "balanc-

ing of interests" process, the Congress compromised the competing interests of the States and the tribes by authorizing the tribes to retain all of the royalties paid under the operating leases and the States to impose taxes on the production of oil and gas. (H. Rept. No. 1791, 69th Cong., 2nd Sess., 69 Cong. Rec. 4580 (1927)). *See also:* (S.B. 876, 68th Cong., 2nd Sess., 66 Cong. Rec. 999 (1924); 66 Cong. Rec. 2234 (1925); 67 Cong. Rec. 10915 (1926).

I would reject Appellants' argument that the 1938 enactment of the Indian Mineral Leasing Act, 25 U.S.C.A. § 396(a), *et. seq.*, repeals 25 U.S.C.A. 398(c). Although cognizant that statutes enacted for the benefit of the dependent Indian tribes are to be liberally construed and that doubtful expressions are to be resolved in favor of the Indians, *Morton* v. *Mancari, supra,* I would hold that because nothing in the Mineral Leasing Act of 1938 speaks to the subject of taxation of oil and gas produced from Indian lands and certainly nothing relating to Executive order reservation lands, there is lacking that required "clear intention" of provisions contained in a general statute necessary to effect repeal of or nullify the express terms of a specific statute, (25 U.S.C.A., 398c.), regardless of the priority of enactment. *Morton* v. *Mancari, supra; Colorado River Water Cons. Dist.* v. *United States,* 424 U.S. 800 (1976); *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973); *Jicarilla Apache Tribe* v. *United States, supra; Glover Construction Company* v. *Andrus,* 591 F.2d 554 (10th Cir. 1979); Sutherland Statutory Construction, 4th Ed., Vol. 2A, § 51.05. Statutes must be construed as intended by the drafters when enacted in the light of conditions as they existed. *United States* v. *Stewart,* 311 U.S. 60 (1940).

In addition to reliance on repeal by implication of 25 U.S.C.A. § 398c. by enactment of 25 U.S.C.A. § 396(a),

et seq., Tribe further relies on the authority of the Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. §§ 476-477.

In accordance with the Indian Reorganization Act, Tribe adopted a revised Constitution on December 23, 1968, subsequently approved by the Undersecretary of the Interior. The revised Constitution organized the tribal government into the tripartite departments of legislative, executive and judicial. The principal governing body is the tribal council consisting of elected members of the Tribe. Pertinent portions of the Tribe's revised Constitution are:

Article XI, Section 1 provides:

> The *inherent powers* of the Jicarilla Apache Tribe, *including* those conferred by Section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended, shall vest in the tribal council and shall be exercised thereby subject only to limitations imposed by the Constitution of the United States, applicable Federal statutes and regulations of the Department of the Interior, and the restrictions established by this revised constitution. [Emphasis supplied].

Subparagraph (e) of Section 1, Article 10, provides:

> (e) Taxes and fees. The tribal council may levy and collect taxes and fees on tribal members, and may enact ordinances, subject to approval by the Secretary of the Interior, to impose taxes and fees on non-members of the tribe doing business on the reservation.

Section 2 of Article 10 establishes the procedures for approval of tribal ordinances, which, in substance, provides that ordinances enacted be presented to the Superintendent, Bureau of Indian Affairs, Jicarilla Apache Agency, within ten days after approval by the Council, and that the Superintendent shall within ten days following receipt by him, transmit it to the Secretary of the Interior with his recom-

mendation. The enactment becomes effective when approved by the Secretary, or if he does not act within 120 days following submittal to him. It was under authority thereof that the tribal council of Tribe on July 9, 1976, enacted its Oil and Gas Severance Tax Ordinance and further enacted a Severance Tax Permanent Fund Ordinance. These ordinances were subsequently approved by the Secretary of the Interior's delegate. The Tribal Severance Tax is expressly imposed on "any oil and natural gas severed, saved and removed from Tribal lands". The *measure* of the tax is 5 cents per million BTU of gas and 29 cents per barrel of crude oil or condensate produced on the Reservation and *"sold or transported off the reservation"*. All oil, gas or condensate representing [reserved] royalty gas "taken by the Tribe in kind and used by the Tribe", *is exempt from the Tax.*

Tribe does not — and cannot — point to any specific language in the Indian Reorganization Act of 1934 authorizing or empowering it to tax. In lieu of any such specific, clear language, Tribe relies upon (a) the stated purpose of the Act, i.e., freedom to organize for purposes of self-government and economic enterprise, and (b) an opinion rendered by the Solicitor to the Secretary of the Interior in 1934, identified as 55 I.D. 14, setting forth the purported intentions of Congress in enacting Section 16 of the Act. The opinion reads in part as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over nonmembers, so far as such nonmembers may accept privileges of trade, residence, etc., to which taxes may be attached as conditions.
>
> . . .
>
> I conclude that under Section 16 of the Wheeler-Howard Act (Public No. 383, 73rd Congress) the

> "powers vested in any Indian tribe or tribal council by existing law", are those powers of local self-government which have never been terminated by law or waived by treaty, and that chief among these powers are the folowing:
>
> . . .
>
> 5. To levy dues, fees, or taxes upon the members of the tribe and upon non-members residing or doing any business of any sort within the reservation, so far as may be consistent with the power of the Commissioner of Indian Affairs over licensed traders.

Tribe contends that the Solicitor's opinion, rendered the same year the Act became effective, is the "best indication of Congressional intent available", citing to *Squire* v. *Capoeman,* 351 U.S. 1 (1956). [Brief of Tribe, In Chief, p. 24]. A careful examination of the exact language employed by the court in *Squire* v. *Capoeman, supra,* is simply that "These relatively contemporaneous official and unofficial writings are entitled to consideration." 351 U.S. at p. 9. I have considered them and find them wanting.

The only express language contained in the 1934 Act vesting rights and powers in a tribe or its tribal council, if organized under the terms of the Act is: *To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments.* 25 U.S.C.A. § 476. The only conceivable language expressed in the § 476, *supra,* which the Solicitor's Opinion 55 I.D. 14 could have relied upon to "make the case" is that authorizing the various Indian tribes to organize under the Act "for its common welfare" and to adopt "an appropriate constitution and bylaws". Any reliance thereon, as support of Tribe's con-

tention that the Act effectively repealed 25 U.S.C. § 398c., *supra,* is misplaced.

My interpretation of the interplay between these conflicting contentions is, I believe, in accord with a detailed analysis of a similar conflict set forth in *Fort Mojave Tribe* v. *San Bernardino County,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1976). In that case, California exercised civil and criminal jurisdiction over Indian country within its borders [but specifically exempted taxation of any real or personal property belonging to any Indian or Indian tribe] authorized under 28 U.S.C. § 1360(b). The court pertinently observed:

> While the imposition of a possessory interest tax on the leasehold interest will have an economic effect on the Indian lessors, and perhaps, although not certainly, will reduce the amount of rent they will be able to collect the legal incidence of the tax clearly falls on the lessee.[3] The lessor will never be personally liable for any delinquent taxes arising under this taxing statute. . . Under these circumstances, there cannot be a direct encumbrance on the lessor's reversionary interest. Similarly, the lease, apart from the lessor's reversionary interest, even if considered an asset of the tribe, is not directly encumbered simply because the amount of the tax is determined by the value of the leasehold. Whatever may be the scope of the indirect burden placed on the lessor's interest in this case, we hold that it is not sufficient to constitute an encumbrance of an "interest in land or other tribal asset."
>
> Our conclusion is buttressed by the Supreme Court's decision in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973). There the Court, relying on the statement that section 476 of the Act [The Indian Reorganization Act of 1934] was designed to encourage tribal enterprises "to enter the white world on a footing of equal competition," 78 Cong.Rec. 11732, found that traditional tax immuni-

ties had neither been expanded nor reduced by the Act. *Mescalero, supra* at 153-54 n.9, 93 S.Ct. 1267. Because the court would not imply tax exemptions absent clear statutory guidelines it upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundaries of their reservation. *We follow that lead here and refuse to find that the Act created a tax exemption for non-Indian lessees of Indian land. Congress has given no clear indication that such a result was desired. When such a signal is given, the state and local governments must retreat.*

• • •

Thus, we see that neither the Act nor PL-280 evidences a Congressional intent to preclude the taxation that is being challenged here. However, we cannot say that PL-280 directly authorizes such taxation. *Bryan* v. *Itasca County, supra,* forecloses the possibility of such a statement by specifically holding that the PL-280 grant of civil jurisdiction only confers jurisdiction over civil causes of action involving Indians. It is not a general grant of regulatory and taxing power over Indians. This is not, however, fatal to the state's cause. Although *McClanahan, supra,* held that, in the absence of Congressional consent, states are preempted from taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, the court specifically did not deal with "exertions of state sovereignty over non-Indians who undertake activity on Indian reservations." *McClanahan, supra* at 411 U.S. 168, 93 S.Ct. at 1260. When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. *McClanahan, supra* at 179, 93 S.Ct. 1257. Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. . . *To permit such non-Indians to enjoy the immunity designed for*

Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question. [Footnote omitted]. [Emphasis supplied].

543 F.2d at pp. 1256, 1257.

I observe that in the case at bar a holding that the New Mexico State taxes levied against the proceeds of oil and gas produced by lessee Operators from Tribe's Reservation lands are valid based upon the express Congressional "signal" authorizing same, i.e., 25 U.S.C. § 398(c), avoids any risk of permitting its imposition absent such clear Congressional consent. The Congress has expressly provided that the taxing laws of the various states extend over and apply to proceeds realized by non-Indian Operators from mineral exploration conducted on Executive Order Reservation lands. It is this power the court recognized in *Warren Trading Post Co.* v. *Arizona State Tax Commission,* 380 U.S. 685 (1965).

In its Reply Brief and Additional Brief filed prior to oral argument, Tribe relies upon the Natural Gas Act of 1978, 15 U.S.C. §§ 3301, *et seq.,* as express Congressional recognition of tribal authority to impose severance taxes on natural gas. 15 U.S.C. § 3320(c) defines, for purposes of the Act, "State Severance Tax" as any "severance production, or similar tax . . . imposed on the production of natural gas . . . by any State or Indian Tribe." Tribe acknowledges that the conference report statement clearly shows that the Congressional conferees did not intend thereby to prejudge the outcome of cases then on appeal to this Court respecting the power of Indian tribes to impose taxes on non-Indians engaged in business activities on Indian reservations. In any event, I would hold that nothing in the language of the Natural Gas Act of 1978 can be interpreted as a Congressional grant of power to Indian

tribes to enact and levy tribal severance taxes. The language is not, either expressly or impliedly, an affirmative grant of such power of taxation to Indian tribes.

III.

I would hold that the District Court did not err in concluding that the Tribe's Severance Tax levied only against oil, gas or condensate produced on the Reservation and sold or transported off the Reservation is an unlawful multiple burden on and discriminatory against interstate commerce.

Tribe and Secretary contend that the severance tax ordinance is not in conflict with the commerce clause because the precise "triggering" event here is entirely "local" in nature, i.e., the tax is imposed on oil and gas when severed, saved and removed from tribal lands. From thence, it is contended that the eventual entry of oil and gas taxed locally upon severance from tribal property into interstate commerce outside of New Mexico does not thereby invalidate the tax. Thus, Tribe and Secretary, in effect, contend that the Tribe's tax is "insulated" by reason of the local nature of its application.

The record reflects that all of the gas provided by Appellee Marathon from Tribe reservation lands is sold in interstate commerce. [R., Vol. VI, p. 240]. Some sixty percent of the production realized by Appellee Amoco is sold in interstate commerce. [R., Vol. VI, p. 229]. Thus, inasmuch as the tax is not designed to apply until the oil and gas produced is "sold or transported off the reservation", I would hold that the incidence bears directly and discriminately against interstate commerce. *Northwestern States Portland Cement Co.* v. *State of Minnesota,* 358 U.S. 450 (1959); *Southern Pacific Co.* v. *Gallagher,* 306 U.S. 167 (1939); *J. D. Adams Manufacturing Co.* v. *Storen,* 304 U.S. 307 (1938). A tax imposed on local activity related to inter-

state commerce is valid only if the local activity is not such an integral part of interstate process, the flow of commerce, that it cannot realistically be separated from it. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U.S. 157 (1954). There a Texas tax on the occupation of "gathering gas", measured by the entire volume of gas "taken", as applied to an interstate natural gas pipeline company, where the taxable incidence is the taking of gas from the outlet of an independent gasoline plant within the State for the purpose of immediate interstate transmission, was held invalid under the Commerce Clause. The Commerce Clause is offended when, as here, the tax, by its very nature, makes interstate commerce bear more than its fair share. *Central Greyhound Lines* v. *Mealey,* 334 U.S. 653 (1948).

The Supreme Court has consistently struck down state laws which discriminately benefit [or may discriminately benefit] local or intrastate commerce at the expense of out-of-state or interstate commerce. In *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117 (1978) the Court held that the Commerce Clause protects the interstate market, and not particular firms from prohibitive regulations. Under this rationale, the Court observed that a state law does not discriminate against interstate commerce if it leaves the in-state and out-of-state businesses participating in the market on an equal competitive footing. In relation to the instant case, those businesses engaged in exclusive *intra-state* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving in *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing.

In *Boston Stock Exchange* v. *State Tax Comm'n.*, 429 U.S. 318 (1977), the Supreme Court stated:

> On various occasions when called upon to make the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers, the Court has counseled that the result turns on the unique characteristics of the statute at issue and the particular circumstances in each case. *E.g., Freeman* v. *Hewit, supra,* at 252. This case-by-case approach has left "much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 457 (1959). Nevertheless, as observed by Mr. Justice Clark in the case just cited: "[F]rom the quagmire there emerge . . . some firm peaks of decision which remain unquestioned." *Id.,* at 458. Among these is the fundamental principle that we find dispositive of the case now before us: No State, consistent with the Commerce Clause, may "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Ibid.* See also *Halliburton Oil Well Co.* v. *Reily,* 373 U.S. 64 (1963); *Nippert* v. *Richmond,* 327 U.S. 416 (1946); *I. M. Darnell & Son* v. *Memphis,* 208 U.S. 113 (1908); *Guy* v. *Baltimore,* 100 U.S. 434, 443 (1880); *Welton* v. *Missouri,* 91 U.S. 275 (1876). The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. *Dean Milk Co.* v. *Madison,* 340 U.S. 349, 356 (1951).
>
> 429 U.S. at p. 329.

I would affirm the District Court.

APPENDIX B

Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing, entered April 25, 1980.

MARCH TERM — April 25, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges

No. 78-1154

J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company, Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company and Gulf Oil Corporation,

Plaintiffs-Appellees,

vs.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council and Cecil Andrus, Secretary of the Interior,

Defendants-Appellants,

Mobil Oil Corporation and Oxy Petroleum, Inc.,

Intervenors-Appellees.

No. 78-1251

Amoco Production Company and Marathon Oil Company,

Plaintiffs-Appellees,

vs.

Jicarilla Apache Tribe, Jicarilla Apache Tribal Council, Gwendolyn Velarde, Treasurer of the Jicarilla Apache Tribe, Cecil Andrus, Secretary of the Interior,

Defendants-Appellants.

This matter comes on for consideration of the petition for rehearing filed by the appellees in the captioned cases.

Upon consideration whereof, it is ordered:

1. Page 6 of the opinion filed February 22, 1980, is recalled and vacated, and a substitute page 6 is published and inserted in its place.

2. The petition for rehearing is denied. Chief Judge Seth and Circuit Judge Barrett voted to grant rehearing. Circuit Judge Seymour, who was not a member of the Court at the time of submission, did not participate.

3. Jicarilla Apache Tribe is granted leave to file its verified bill of costs out of time. The Court has considered the objection to the bill of costs filed by appellees. The Clerk shall issue a statement of costs in favor of appellant Jicarilla Apache Tribe in the sum of $993.51.

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS, Clerk

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: Nos. 78-1154 and 78-1251, Merrior, et al, v. Jicarilla Apache Tribe, et al

Enclosed is a new page 6 to be substituted for page 6 in the original opinion, which was filed February 22, 1980.

Very truly yours,

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

HKP/dvc

I

Before proceeding to the merits, we must consider two jurisdictional questions — whether the trial court had jurisdiction to enjoin the Secretary of the Interior from taking any action to enforce the tax, and whether the court had jurisdiction over the Tribe.

Lessees sued the Secretary on the basis that in approving the Tribe's tax ordinance he violated the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.* The APA is not an independent grant of federal jurisdiction. Califano v. Sanders, 430 U.S. 99, 105-07 (1977). Since only injunctive relief is sought, an action can be maintained against the Secretary under the 1976 amendments to 5 U.S.C. § 702. Appellees admit waiving the defense that the Secretary improperly delegated his approval function to the local official of the Bureau of Indian Affairs. The only arguments made in this Court that the Secretary acted unlawfully under the APA go to the merits of the tax and are treated hereafter.

The Tribe asserts that under the doctrine of sovereign immunity it could not be sued and therefore the trial court was without jurisdiction,[2] citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) and United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940). Those cases clearly hold a tribe

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[2] The pretrial order recites that the Tribe, pursuant to a resolution of its Council, "waived any claim to sovereign immunity for the determination of the legal validity of this tax." No question of immunity of the Tribe from suit was raised until it filed a reply brief in this Court.

APPENDIX C

Findings of Fact and Conclusion of Law of the United States District Court for the District of New Mexico, entered December 29, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 77-292 Civil

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Defendants,

AND

MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,
Intervenors.

AND

CONSOLIDATED CASES

No. 77-343 Civil

AMOCO PRODUCTION COMPANY, A CORPORATION, AND MARATHON OIL COMPANY, A CORPORATION,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR, TONY MARTINEZ, EXECUTIVE DIRECTOR, NEW MEXICO OIL AND GAS ACCOUNTING COMMISSION,
Defendants.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following shall constitute the Findings of Fact and Conclusions of Law of the Court:

FINDINGS OF FACT

1. J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, are residents of the State of New Mexico.

2. Jerome T. McHugh is a resident of the State of New Mexico.

3. Chase Oil Company is a New Mexico Corporation with its principal place of business in New Mexico.

4. Dugan Production Corporation is a New Mexico Corporation with its principal place of business in New Mexico.

5. Consolidated Oil and Gas, Inc., is a Colorado corporation with its principal place of business in Colorado.

6. Southland Royalty Company, formerly Aztec Oil and Gas, is a Delaware Corporation with its principal place of business in the State of Texas.

7. Tesoro Petroleum Corporation is a Delaware Corporation with its principal place of business in the State of Texas.

8. Amerada Hess is a Delaware Corporation with its principal place of business in the State of New York.

9. Supron Energy Corporation, formerly Southern Union Production Company, is a Delaware Corporation with its principal place of business in the State of Texas.

10. Energy Reserves Group, Inc., is a Delaware Corporation with its principal place of business in Kansas.

11. J. M. Huber Corporation is a New Jersey Corporation with its principal place of business in the State of New Jersey.

12. Continental Oil Company is a Delaware Corporation with its principal place of business located in the State of Connecticut.

13. Atlantic Richfield Company is a Pennsylvania Corporation located within the State of California.

14. Phillips Petroleum Company is a Delaware Corporation with its principal place of business located in the State of Oklahoma.

15. Tenneco Oil Company is a Delaware Corporation with its principal place of business located within the State of Texas.

16. Getty Oil Company is a Delaware Corporation with its principal place of business located in California.

17. Gulf Oil Corporation is a Pennsylvania Corporation with its principal place of business located in the State of Pennsylvania.

18. Mobil Oil Corporation is a Delaware Corporation with its principal place of business in the State of New York.

19. Oxy Petroleum, Inc., is a California Corporation, with its principal place of business in the State of California.

20. Amoco is a Delaware corporation with its principal place of business in Illinois.

21. Marathon is an Ohio corporation with its principal place of business in Ohio.

22. The Jicarilla Apache Tribe is an Indian Tribe organized pursuant to 25 U.S.C. §§ 476-477, residing on an Executive Order Indian Reservation within the boundaries of the State of New Mexico. The Jicarilla Apache Tribal Council exercises the legislative powers of the Jicarilla Apache Tribe. Gwendolyn Velarde is the Treasurer of the Jicarilla Apache Tribe and is responsible for the enforce-

ment and collection of the Jicarilla Oil and Gas Severance Tax. Cecil Andrus is Secretary of the Interior.

23. The plaintiffs hold leases, granted by the Secretary of the Interior with the consent of the Tribe, for the recovery of oil and gas on the Jicarilla Apache Indian Reservation. Plaintiffs are at present producing oil and gas products on the reservation and paying royalties to the Tribe. Approximately 80% of the products are shipped interstate for sale outside the State of New Mexico.

24. The State of New Mexico imposes and collects from the plaintiffs the following taxes measured by the production on the Jicarilla Apache Reservation:

Oil and gas emergency school tax;

Oil and gas conservation tax;

Oil and gas production equipment ad valorem tax; and

Oil and gas severance tax.

25. The Jicarilla Apache Tribe on November 22, 1968, adopted a revised constitution which included a provision authorizing the Tribal Council to enact ordinances providing for the levy and collection of taxes and fees on nonmembers of the Tribe doing business on the reservation. The revised constitution, as amended, was approved by the acting Undersecretary of the Interior on or about February 13, 1969.

26. On or about July 9, 1976, the Jicarilla Apache Tribal Council adopted the Jicarilla Oil and Gas Severance Tax in No. 77-0-02 and thereafter such ordinance was amended by Tribal Council Ordinance No. 77-0-195 and resolution 77-327.

27. That in enacting 25 U.S.C. § 398(c) Congress intended to allow the states and local authorities the exclu-

sive right to tax oil and gas production from executive order Indian reservations.

28. That in enacting 25 U.S.C. § 398(c) Congress did not intend to include Indian tribes within the meaning of "state or local authority."

29. The Jicarilla Oil and Gas Severance Tax by its terms and the instructions for its implementation applies only to oil and gas produced on the Jicarilla Apache Reservation and not to similarly situated oil and gas produced in the same geological region of northwest New Mexico.

30. The Jicarilla Oil and Gas Severance Tax expressly provides for an exemption from taxation for "royalty gas, oil or condensate taken by the Tribe in kind, and used by the tribe."

31. The Jicarilla Apache Tribal Oil and Gas Severance Tax as well as the written instructions directed to plaintiffs with regard to the payment of the tax, expressly provides that the tax need only be paid on gas, crude oil or condensate produced on the Jicarilla Apache Reservation "and sold or transported off the Reservation."

32. The Jicarilla Oil and Gas Severance Tax would, if valid, amount to over two million dollars annually.

33. That the plaintiffs would have the right under their contractual provisions to pass the majority of the burden of the Jicarilla Gas Severance Tax, if valid, onto their customers.

34. That if the plaintiffs are required to absorb the Jicarilla Oil Severance Tax such tax will substantially limit the ability of some of the plaintiffs to profitably operate some of the existing oil wells on the Jicarilla Apache Reservation.

35. If the wells operated by plaintiffs cannot be operated profitably the plaintiffs would be required to shut down such wells resulting in a loss of natural resources and an unjust return of the wells to the Jicarilla Apache Tribe.

36. That if the Jicarilla Apache Oil and Gas Severance Tax were valid the combined tax burden amounts to more than 29% of the interstate price of old gas and over 12.5% of the price of old oil.

37. That unless the Jicarilla Apache Tribal Severance Tax contained in Tribal Council Ordinance No. 77-0-02, as amended by Tribal Ordinance No. 77-0-195 and resolution 77-327, is declared invalid and the defendants restrained from taking action they will move to enforce such Ordinances and resolutions and collect the Jicarilla Apache Tribal Oil and Gas Severance Tax.

38. The Jicarilla Apache Tribe Severance Tax became effective April 1, 1977. Under the terms of the ordinance, plaintiffs would be subject to the severance tax by virtue of their production of natural gas and condensate on the Jicarilla Apache Reservation. Enforcement of the tax has been stayed pending a resolution of the legality of the tax.

39. That plaintiffs sell the gas and oil produced from the Jicarilla Apache Reservation in both interstate and intrastate commerce.

40. Prior to their incorporation under the Indian Reorganization Act in 1937 the Jicarilla Apache Tribe had never attempted to exercise a power of taxation over non-Indians.

41. That in adopting the Indian Reorganization Act 25 U.S.C. § 464 *et seq.* Congress intended Indian tribes accepting a charter thereunder to have only those powers specifically enumerated in the Act together with such

powers as were "vested in any Indian tribe or tribal council by existing law." The power to tax non-Indians is not one of the enumerated powers given to Indian Tribes incorporating under 25 U.S.C. § 464 and was not vested in the Jicarilla Apache Tribe by existing law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this action.

2. That venue is proper in the United States District Court for the District of New Mexico.

3. That by enacting 25 U.S.C. § 398(c) Congress granted the state and local authorities the exclusive right to impose a severance tax upon oil and gas produced from executive order Indian reservations.

4. That the Jicarilla Apache Tribe is not a "state or local authority" within the meaning of 25 U.S.C. § 398(c).

5. The Jicarilla Apache Tribe Oil and Gas Severance Tax constitutes an unlawful multiple burden on interstate commerce.

6. The Jicarilla Apache Tribe Oil and Gas Severance Tax is levied only against natural gas, crude oil or condensate which is produced on the reservation and sold or transported off the reservation and therefor discriminates against interstate commerce.

7. Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation.

8. That, as of the effective date of 25 U.S.C. § 464, et seq., the power to tax non-Indians was not vested in the

Jicarilla Apache Tribe or its Tribal Council, and not being one of the powers enumerated in the Act, the Secretary of the Interior's approval of the Tribal Constitution cannot operate to vest such power in the Tribe.

9. An actual justiciable controversy exists between the plaintiffs and defendants under the meaning of the Declaratory Judgment Act, 25 U.S.C. 2201 *et seq.* and pursuant to that act this Court declares the Jicarilla Oil and Gas Severance Tax to be illegal, unconstitutional, invalid and void and in conjunction with this Declaratory Judgment issues a permanent injunction restraining defendants from taking any action to collect the Jicarilla Apache Oil and Gas Severance Tax.

Any requested Findings of Fact and Conclusions of Law not included herein are hereby denied.

H. VEARLE PAYNE
UNITED STATES DISTRICT JUDGE

APPENDIX D

Judgment of the United States District Court for the District of New Mexico, entered December 29, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 77-292 Civil

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL AND CECIL ANDRUS, SECRETARY OF THE INTERIOR,
Defendants.

AND

MOBIL OIL CORPORATION AND OXY PETROLEUM, INC.,
Intervenors.

AND

CONSOLIDATED CASES

No. 77-343 Civil

AMOCO PRODUCTION COMPANY, A CORPORATION, AND MARATHON OIL COMPANY, A CORPORATION,
Plaintiffs,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, CECIL ANDRUS, SECRETARY OF THE INTERIOR, TONY MARTINEZ, EXECUTIVE DIRECTOR, NEW MEXICO OIL AND GAS ACCOUNTING COMMISSION,
Defendants.

JUDGMENT

THIS MATTER having been heard by the Court and the Court having studied the briefs submitted by the parties, heard the testimony, evidence and arguments of counsel and having entered its Findings of Fact and Conclusions of Law and being otherwise fully advised in the premises,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Jicarilla Apache Oil and Gas Severance Tax is illegal, unconstitutional, invalid and void, it is therefore,

ORDERED that a Permanent Injunction is herewith issued and that defendants, their agents, servants, employees and attorneys and all persons in active concert and participation with defendants be, and they hereby are restrained and enjoined from taking any action to enforce or collect the Jicarilla Apache Oil and Gas Severance Tax.

IT IS FURTHER ORDERED that the plaintiffs and intervenors recover their costs to be taxed by the Clerk of the Court.

H. Vearle Payne
UNITED STATES DISTRICT JUDGE

APPENDIX E

Constitution of the United States:

(1) Article I, Section 1
(2) Article II, Section 1
(3) Article III, Section 1
(4) Article IV, Sections 1, 3 and 4
(5) Article V
(6) Article VI, Sections 2 and 3
(7) Article VII
(8) Tenth Amendment

E. CONSTITUTION OF THE UNITED STATES

(1) Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

(2) Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and, if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: — "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

(3) Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior

Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(4) Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

(5) Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Con-

stitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of it's equal Suffrage in the Senate.

(6) Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

(7) Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

(8) AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(9) AMENDMENT X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

(10) AMENDMENT XIV.

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

Statutes:

(1) Indian Reorganization Act of June 18, 1934, Chapter 576, 48 Stat. 984, 25 U.S.C. Sec. 461, et seq.

(2) Act of March 3, 1871, Chapter 120, Sec. 1, 16 Stat. 566, 25 U.S.C., Sec. 71.

F (1)

Indian Reorganization Act of June 18, 1934, Chapter 576, 48 Stat. 984, 25 U.S.C. Sec. 461 et seq.

AN ACT

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

SEC. 3. The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to re-

store to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however,* That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further,* That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: *Provided further,* That the order of the Department of the Interior signed, dated, and approved by Honorable Ray Lyman Wilbur, as Secretary of the Interior, on October 28, 1932, temporarily withdrawing lands of the Papago Indian Reservation in Arizona from all forms of mineral entry or claim under the public land mining laws, is hereby revoked and rescinded, and the lands of the said Papago Indian Reservation are hereby restored to exploration and location, under the existing mining laws of the United States, in accordance with the express terms and provisions declared and set forth in the Executive orders establishing said Papago Indian Reservation: *Provided further,* That damages shall be paid to the Papago Tribe for loss of any improvements on any land located for mining in such a sum as may be determined by the Secretary of the Interior but not to exceed the cost of said improvements: *Provided further,* That a yearly rental not to exceed five cents per acre shall be paid to the Papago Tribe for loss of the use or occupancy of any land withdrawn by the requirements of mining operations, and payments derived from damages or rentals shall be deposited in the Treasury of the United States to the credit of the Papago Tribe: *Provided further,* That in the event any person or persons, partnership, corporation, or association, desires a mineral patent,

according to the mining laws of the United States, he or they shall first deposit in the Treasury of the United States to the credit of the Papago Tribe the sum of $1.00 per acre in lieu of annual rental, as hereinbefore provided, to compensate for the loss or occupancy of the lands withdrawn by the requirements of mining operations: *Provided further,* That patentee shall also pay into the Treasury of the United States to the credit of the Papago Tribe damages for the loss of improvements not heretofore paid in such a sum as may be determined by the Secretary of the Interior, but not to exceed the cost thereof; the payment of $1.00 per acre for surface use to be refunded to patentee in the event that patent is not acquired.

Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes; and nothing contained herein, except as expressly provided, shall be construed as authority for the Secretary of the Interior, or any other person, to issue or promulgate a rule or regulation in conflict with the Executive order of February 1, 1917, creating the Papago Indian Reservation in Arizona or the Act of February 21, 1931 (46 Stat. 1202).

SEC. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or

Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member: *Provided, further,* That the Secretary of the Interior may authorize voluntary exchanges of lands of equal value and the voluntary exchange of shares of equal value whenever such exchange, in his judgment, is expedient and beneficial for or compatible with the proper consolidation of Indian lands and for the benefit of cooperative organizations.

SEC. 5. The Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided,* That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona and New Mexico, in the event that the proposed Navajo boundary extension measures now pending in Congress and embodied in the bills (S. 2499 and H.R. 8927) to define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes, and the bills (S. 2531 and H.R. 8982) to define the exterior boundaries of the Navajo Indian Reservation in New Mexico and for other purposes, or similar legislation, become law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

SEC. 6. The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

SEC. 7. The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided,* That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

SEC. 8. Nothing contained in this Act shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter.

SEC. 9. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order

of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations or other organizations created under this Act.

SEC. 10. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $10,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established. A report shall be made annually to Congress of transactions under this authorization.

SEC. 11. There is hereby authorized to be appropriated, out of any funds in the United States Treasury not otherwise appropriated, a sum not to exceed $250,000 annually, together with any unexpended balances of previous appropriations made pursuant to this section, for loans to Indians for the payment of tuition and other expenses in recognized vocational and trade schools: *Provided,* That not more than $50,000 of such sum shall be available for loans to Indian students in high schools and colleges. Such loans shall be reimbursable under rules established by the Commissioner of Indian Affairs.

SEC. 12. The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter

have the preference to appointment to vacancies in any such positions.

SEC. 13. The provisions of this Act shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 9, 10, 11, 12, and 16, shall apply to the Territory of Alaska: *Provided,* That Sections 2, 4, 7, 16, 17, and 18 of this Act shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawnee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 4 of this Act shall not apply to the Indians of the Klamath Reservation in Oregon.

SEC. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (23 Stat.L. 894), or their commuted cash value under the Act of June 10, 1896 (29 Stat.L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (25 Stat.L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive in his own right more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse. Such benefits shall

continue to be paid upon such reservation until such time as the lands available therein for allotment at the time of the passage of this Act would have been exhausted by the award to each person receiving such benefits of an allotment of eighty acres of such land.

SEC. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

SEC. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands,

interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

SEC. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

SEC. 18. This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after the passage and aproval of this Act, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

SEC. 19. The term "Indian" as used in this Act shall include all persons of Indian descent who are members of

any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

Approved, June 18, 1934.

F (2)

Act of March 3, 1871, Chapter 120, Sec. 1., 16 Stat. 566, 25 U.S.C. Sec. 71.

Future treaties with Indian tribes.

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be invalidated or impaired. (R.S. Sec. 2079)

APPENDIX G

Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922.

TREATY OF PEACE, FRIENDSHIP, LIMITS, AND SETTLEMENT WITH THE REPUBLIC OF MEXICO

(Treaty of Guadalupe Hidalgo — 9 Stat. 922)

(Ratifications exchanged at Queretaro, May 30, 1848)

In the name of Almighty God:

The United States of America and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony, and mutual confidence wherein the two people should live, as good neighbors, have for that purpose appointed their respective plenipotentiaries — that is to say, the President of the United States has appointed Nicholas P. Trist, a citizen of the United States, and the President of the Mexican republic has appointed Don Luis Gonzaga Cuevas, Don Bernardo Couto, and Don Miguel Atristain, citizens of the said republic, who, after a reciprocal communication of their respective full powers, have, under the protection of Almighty God, the author of peace, arranged, agreed upon, and signed the following

Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic.

Article I.

There shall be firm and universal peace between the United States of America and the Mexican republic, and

between their respective countries, territories, cities, towns, and people, without exception of places or persons.

ARTICLE II.

Immediately upon the signature of this treaty, a convention shall be entered into between a commissioner or commissioners appointed by the General-in-chief of the forces of the United States, and such as may be appointed by the Mexican government, to the end that a provisional suspension of hostilities shall take place, and that, in the places occupied by the said forces, constitutional order may be reestablished, as regards the political, administrative, and judicial branches, so far as this shall be permitted by the circumstances of military occupation.

ARTICLE III.

Immediately upon the ratification of the present treaty by the government of the United States, orders shall be transmitted to the commanders of their land and naval forces, requiring the latter (provided this treaty shall then have been ratified by the government of the Mexican republic, and the ratifications exchanged) immediately to desist from blockading any Mexican ports; and requiring the former (under the same condition) to commence, at the earliest moment practicable, withdrawing all troops of the United States then in the interior of the Mexican republic, to points that shall be selected by common agreement, at a distance from the seaports not exceeding thirty leagues; and such evacuation of the interior of the republic shall be completed with the least possible delay; the Mexican government hereby binding itself to afford every facility in its power for rendering the same convenient to the troops, on their march and in their new positions, and for promoting

a good understanding between them and the inhabitants. In like manner orders shall be despatched to the persons in charge of the custom-houses at all ports occupied by the forces of the United States, requiring them (under the same condition) immediately to deliver possession of the same to the persons authorized by the Mexican government to receive it, together with all bonds and evidences of debt for duties on importations and on exportations, not yet fallen due. Moreover, a faithful and exact account shall be made out, showing the entire amount of all duties on imports and on exports, collected at such custom-houses, or elsewhere in Mexico, by authority of the United States, from and after the day of the ratification of this treaty by the government of the Mexican republic; and also an account of the cost of collection; and such entire amount, deducting only the cost of collection, shall be delivered to the Mexican government, at the city of Mexico, within three months after the exchange of ratifications.

The evacuation of the capital of the Mexican republic by the troops of the United States, in virtue of the above stipulation, shall be completed in one month after the orders there stipulated for shall have been received by the commander of said troops, or sooner if possible.

ARTICLE IV.

Immediately after the exchange or ratifications of the present treaty, all castles, forts, territories, places, and possessions, which have been taken or occupied by the forces of the United States during the present war, within the Mexican republic, as about to be established by the following article, shall be definitively restored to the said republic, together with all the artillery, arms, apparatus of war, munitions, and other public property, which were in the said castles and forts when captured, and which shall

remain there at the time when this treaty shall be duly ratified by the government of the Mexican republic. To this end, immediately upon the signature of this treaty, orders shall be despatched to the American officers commanding such castles and forts, securing against the removal or destruction of any such artillery, arms, apparatus of war, munitions, or other public property. The city of Mexico, within the inner line of intrenchments surrounding the said city, is comprehended in the above stipulations, as regards the restoration of artillery, apparatus of war, &c.

The final evacuation of the territory of the Mexican republic, by the forces of the United States, shall be completed in three months from the said exchange of ratifications, or sooner, if possible: the Mexican government hereby engaging, as in the foregoing article, to use all means in its power for facilitating such evacuation, and rendering it convenient to the troops, and for promoting a good understanding between them and the inhabitants.

If, however, the ratification of this treaty by both parties should not take place in time to allow the embarcation of the troops of the United States to be completed before the commencement of the sickly season, at the Mexican ports on the Gulf of Mexico, in such case a friendly arrangement shall be entered into between the General-in-chief of the said troops and the Mexican government, whereby healthy and otherwise suitable places, at a distance from the ports not exceeding thirty leagues, shall be designated for the residence of such troops as may not yet have embarked, until the return of the healthy season. And the space of time here referred to as comprehending the sickly season, shall be understood to extend from the first day of May to the first day of November.

All prisoners of war taken on either side, on land or on sea, shall be restored as soon as practicable after the ex-

change of ratifications of this treaty. It is also agreed that if any Mexicans should now be held as captives by any savage tribe within the limits of the United States, as about to be established by the following article, the government of the said United States will exact the release of such captives, and cause them to be restored to their country.

ARTICLE V.

The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the said river, until it empties into the *Rio* Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled "*Map of the United Mexican States, as organized and defined by various acts of the Congress of said republic, and constructed according to the best authorities. Revised edition. Published at New York*, in 1847, *by J. Disturnell.*"

Of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing-master of the Spanish fleet, and published at Madrid in the year 1802, in the Atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision, upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both republics, as described in the present article, the two governments shall each appoint a commissioner and a surveyor, who, before the expiration of one year from the date of the ratifications of this treaty, shall meet at the port of San Diego, and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations; and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two republics, and no change shall ever be made therein, except, by the express and free consent of both nations, lawfully given by the

general government of each, in conformity with its own constitution.

ARTICLE VI.

The vessels and citizens of the United States shall, in all time, have a free and uninterrupted passage by the Gulf of California, and by the River Colorado below its confluence with the Gila, to and from their possessions situated north of the boundary line defined in the preceding article; it being understood that this passage is to be by navigating the Gulf of California and the River Colorado, and not by land, without the express consent of the Mexican government.

If, by the examinations which may be made, it should be ascertained to be practicable and advantageous to construct a road, canal, or railway, which should in whole or in part run upon the River Gila, or upon its right or its left bank, within the space of one marine league from either margin of the river, the governments of both republics will form an agreement regarding its construction, in order that it may serve equally for the use and advantage of both countries.

ARTICLE VII.

The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels,

or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

ARTICLE VIII.

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and

all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

ARTICLE IX.

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE X.

[Stricken out.]

ARTICLE XI.

Considering that a great part of the territories which, by the present treaty, are to be comprehended for the future within the limits of the United States, is now occupied by savage tribes, who will hereafter be under the exclusive control of the government of the United States, and whose incursions within the territory of Mexico would be prejudicial in the extreme, it is solemnly agreed that all such incursions shall be forcibly restrained by the government of the United States whensoever this may be necessary; and that when they cannot be prevented, they shall be punished by the said government, and satisfaction for the same shall be exacted — all in the same way, and with

equal diligence and energy, as if the same incursions were meditated or committed within its own territory, against its own citizens.

It shall not be lawful, under any pretext whatever, for any inhabitant of the United States to purchase or acquire any Mexican, or any foreigner residing in Mexico, who may have been captured by Indians inhabiting the territory of either of the two republics, nor to purchase or acquire horses, mules, cattle, or property of any kind, stolen within Mexican territory by such Indians.

And in the event of any person or persons, captured within Mexican territory by Indians, being carried into the territory of the United States, the government of the latter engages and binds itself, in the most solemn manner, so soon as it shall know of such captives being within its territory, and shall be able so to do, through the faithful exercise of its influence and power, to rescue them and return them to their country, or deliver them to the agent or representative of the Mexican government. The Mexican authorities will, as far as practicable, give to the government of the United States notice of such captures; and its agent shall pay the expenses incurred in the maintenance and transmission of the rescued captives; who, in the mean time, shall be treated with the utmost hospitality by the American authorities at the place where they may be. But if the government of the United States, before receiving such notice from Mexico, should obtain intelligence, through any other channel, of the existence of Mexican captives within its territory, it will proceed forthwith to effect their release and delivery to the Mexican agent, as above stipulated.

For the purpose of giving to these stipulations the fullest possible efficacy, thereby affording the security and redress

demanded by their true spirit and intent, the government of the United States will now and hereafter pass, without unnecessary delay, and always vigilantly enforce, such laws as the nature of the subject may require. And finally, the sacredness of this obligation shall never be lost sight of by the said government when providing for the removal of the Indians from any portion of the said territories, or for its being settled by citizens of the United States; but on the contrary, special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obligated themselves to restrain.

ARTICLE XII.

In consideration of the extension acquired by the boundaries of the United States, as defined in the fifth article of the present treaty, the government of the United States engages to pay to that of the Mexican republic the sum of fifteen millions of dollars.

Immediately after this treaty shall have been duly ratified by the government of the Mexican republic, the sum of three millions of dollars shall be paid to the said government by that of the United States, at the city of Mexico, in the gold or silver coin of Mexico. The remaining twelve millions of dollars shall be paid at the same place, and in the same coin, in annual instalments of three millions of dollars each, together with interest on the same at the rate of six per centum per annum. This interest shall begin to run upon the whole sum of twelve millions from the day of the ratification of the present treaty by the Mexican government, and the first of the instalments shall be paid at the expiration of one year from the same day. Together with each annual instalment, as it falls due, the whole in-

terest accruing on such instalment from the beginning shall also be paid.

ARTICLE XIII.

The United States engage, moreover, to assume and pay to the claimants all the amounts now due them, and those hereafter to become due, by reason of the claims already liquidated and decided against the Mexican republic, under the conventions between the two republics severally concluded on the eleventh day of April, eighteen hundred and thirty-nine, and on the thirtieth day of January, eighteen hundred and forty-three; so that the Mexican republic shall be absolutely exempt, for the future, from all expense whatever on account of the said claims.

ARTICLE XIV.

The United States do furthermore discharge the Mexican republic from all claims of citizens of the United States, not heretofore decided against the Mexican government, which may have arisen previously to the date of the signature of this treaty; which discharge shall be final and perpetual, whether the said claims be rejected or be allowed by the board of commissioners provided for in the following article, and whatever shall be the total amount of those allowed.

ARTICLE XV.

The United States, exonerating Mexico from all demands on account of the claims of their citizens mentioned in the preceding article, and considering them entirely and forever cancelled, whatever their amount may be, undertake to make satisfaction for the same, to an amount not exceeding three and one quarter millions of dollars. To ascertain the validity and amount of those claims, a board of commissioners shall be established by the government of the

United States, whose awards shall be final and conclusive: provided, that in deciding upon the validity of each claim, the board shall be guided and governed by the principles and rules of decision prescribed by the first and fifth articles of the unratified convention, concluded at the city of Mexico on the twentieth day of November, one thousand eight hundred and forty-three;* and in no case shall an award be made in favor of any claim not embraced by these principles and rules.

If, in the opinion of the said board of commissioners, or of the claimants, any books, records, or documents in the possession or power of the government of the Mexican republic, shall be deemed necessary to the just decision of any claim, the commissioners, or the claimants through them, shall, within such period as Congress may designate, make an application in writing for the same, addressed to the Mexican Minister for Foreign Affairs, to be transmitted by the Secretary of State of the United States; and the Mexican government engages, at the earliest possible moment after the receipt of such demand, to cause any of the books, records, or documents, so specified, which shall be in their possession or power, (or authenticated copies or extracts of the same,) to be transmitted to the said Secretary of State, who shall immediately deliver them over to the said board of commissioners: *Provided*, That no such application shall be made by, or at the instance of, any claimant, until the facts which it is expected to prove by such books, records, or documents, shall have been stated under oath or affirmation.

ARTICLE XVI.

Each of the contracting parties reserves to itself the entire right to fortify whatever point within its territory it may judge proper so to fortify, for its security.

ARTICLE XVII.

The treaty of amity, commerce, and navigation, concluded at the city of Mexico on the fifth day of April, A. D. 1831, between the United States of America and the United Mexican States, except the additional article, and except so far as the stipulations of the said treaty may be incompatible with any stipulation contained in the present treaty, is hereby revived for the period of eight years from the day of the exchange of ratifications of this treaty, with the same force and virtue as if incorporated therein; it being understood that each of the contracting parties reserves to itself the right, at any time after the said period of eight years shall have expired, to terminate the same by giving one year's notice of such intention to the other party.

ARTICLE XVIII.

All supplies whatever for troops of the United States in Mexico, arriving at ports in the occupation of such troops previous to the final evacuation thereof, although subsequently to the restoration of the custom-houses at such ports, shall be entirely exempt from duties and charges of any kind; the government of the United States hereby engaging and pledging its faith to establish, and vigilantly to enforce, all possible guards for securing the revenue of Mexico, by preventing the importation, under cover of this stipulation, of any articles other than such, both in kind and in quantity, as shall really be wanted for the use and consumption of the forces of the United States during the time they may remain in Mexico. To this end, it shall be the duty of all officers and agents of the United States to denounce to the Mexican authorities at the respective ports any attempts at a fraudulent abuse of this stipulation which they may know of or may have reason to suspect, and to

give to such authorities all the aid in their power with regard thereto; and every such attempt, when duly proved and established by sentence of a competent tribunal, shall be punished by the confiscation of the property so attempted to be fradulently introduced.

Article XIX.

With respect to all merchandise, effects, and property whatsoever, imported into ports of Mexico whilst in the occupation of the forces of the United States, whether by citizens of either republic, or by citizens or subjects of any neutral nation, the following rules shall be observed: —

1. All such merchandise, effects, and property, if imported, previously to the restoration of the custom-houses to the Mexican authorities, as stipulated for in the third article of this treaty, shall be exempt from confiscation, although the importation of the same be prohibited by the Mexican tariff.

2. The same perfect exemption shall be enjoyed by all such merchandise, effects, and property, imported subsequently to the restoration of the custom-houses, and previously to the sixty days fixed in the following article for the coming into force of the Mexican tariff at such ports respectively; the said merchandise, effects, and property being, however, at the time of their importation, subject to the payment of duties, as provided for in the said following article.

3. All merchandise, effects, and property described in the two rules foregoing shall, during their continuance at the place of importation, and upon their leaving such place for the interior, be exempt from all duty, tax, or impost of every kind, under whatsoever title or denomination. Nor

shall they be there subjected to any charge whatsoever upon the sale thereof.

4. All merchandise, effects, and property, described in the first and second rules, which shall have been removed to any place in the interior whilst such place was in the occupation of the forces of the United States, shall, during their continuance therein, be exempt from all tax upon the sale or consumption thereof, and from every kind of impost or contribution, under whatsoever title or denomination.

5. But if any merchandise, effects, or property, described in the first and second rules, shall be removed to any place not occupied at the time by the forces of the United States, they shall, upon their introduction into such place, or upon their sale or consumption there, be subject to the same duties which, under the Mexican laws, they would be required to pay in such cases if they had been imported in time of peace, through the maritime custom-houses, and had there paid the duties conformably with the Mexican tariff.

6. The owners of all merchandise, effects, or property described in the first and second rules, and existing in any port of Mexico, shall have the right to reship the same, exempt from all tax, impost, or contribution whatever.

With respect to the metals, or other property, exported from any Mexican port whilst in the occupation of the forces of the United States, and previously to the restoration of th custom-house at such port, no person shall be required by the Mexican authorities, whether general or state, to pay any tax, duty, or contribution upon any such exportation, or in any manner to account for the same to the said authorities.

ARTICLE XX.

Through consideration for the interests of commerce generally, it is agreed, that if less than sixty days should elapse between the date of the signature of this treaty and the restoration of the custom-houses, conformably with the stipulation in the third article, in such case all merchandise, effects, and property whatsoever, arriving at the Mexican ports after the restoration of the said custom-houses, and previously to the expiration of sixty days after the day of the signature of this treaty, shall be admitted to entry; and no other duties shall be levied thereon than the duties established by the tariff found in force at such custom-houses at the time of the restoration of the same. And to all such merchandise, effects, and property, the rules established by the preceding article shall apply.

ARTICLE XXI.

If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good

neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case.

Article XXII.

If (which is not to be expected, and which God forbid!) war should unhappily break out between the two republics, they do now, with a view to such calamity, solemnly pledge themselves to each other and to the world, to observe the following rules; absolutely where the nature of the subject permits, and as closely as possible in all cases where such absolute observance shall be impossible: —

1. The merchants of either republic then residing in the other shall be allowed to remain twelve months, (for those dwelling in the interior,) and six months (for those dwelling at the seaports,) to collect their debts and settle their affairs; during which periods, they shall enjoy the same protection, and be on the same footing, in all respects, as the citizens or subjects of the most friendly nations; and, at the expiration thereof, or at any time before, they shall have full liberty to depart, carrying off all their effects without molestation or hinderance, conforming therein to the same laws which the citizens or subjects of the most friendly nations are required to conform to. Upon the entrance of the armies of either nation into the territories of the other, women and children, ecclesiastics, scholars of every faculty, cultivators of the earth, merchants, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all persons whose occupations are for the common subsistence

and benefit of mankind, shall be allowed to continue their respective employments unmolested in their persons. Nor shall their houses or goods be burnt or otherwise destroyed, nor their cattle taken, nor their fields wasted, by the armed force into whose power, by the events of war, they may happen to fall; but if the necessity arise to take any thing from them for the use of such armed force, the same shall be paid for at an equitable price. All churches, hospitals, schools, colleges, libraries, and other establishments for charitable and beneficent purposes, shall be respected, and all persons connected with the same protected in the discharge of their duties, and the pursuit of their vocations.

2. In order that the fate of prisoners of war may be alleviated, all such practices as those of sending them into distant inclement or unwholesome districts, or crowding them into close and noxious places, shall be studiously avoided. They shall not be confined in dungeons, prison-ships, or prisons; nor be put in irons, or bound, or otherwise restrained in the use of their limbs. The officers shall enjoy liberty on their paroles, within convenient districts, and have confortable quarters; and the common soldier shall be disposed in cantonments, open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for its own troops. But if any officer shall break his parole by leaving the district so assigned him, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual, officer, or other prisoner, shall forfeit so much of the benefit of this article as provides for his liberty on parole or in cantonment. And if any officer so breaking his parole, or any common soldier so escaping from the limits assigned him, shall afterwards be found in arms, previously to his being regularly exchanged, the person so offending shall

be dealth with according to the established laws of war. The officers shall be daily furnished by the party in whose power they are, with as many rations, and of the same articles, as are allowed, either in kind or by commutation, to officers of equal rank in its own army; and all others shall be daily furnished with such ration as is allowed to a common soldier in its own service: the value of all which supplies shall, at the close of the war, or at periods to be agreed upon between the respective commanders, be paid by the other party, on a mutual adjustment of accounts for the subsistence of prisoners; and such accounts shall not be mingled with or set off against any others, nor the balance due on them be withheld, as a compensation or reprisal for any cause whatever, real or pretended. Each party shall be allowed to keep a commissary of prisoners, appointed by itself, with every cantonment of prisoners, in possession of the other; which commissary shall see the prisoners as often as he pleases; shall be allowed to receive, exempt from all duties or taxes, and to distribute, whatever comforts may be sent to them by their friends; and shall be free to transmit his reports in open letters to the party by whom he is employed.

And it is declared that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending the solemn covenant contained in this article. On the contrary, the state of war is precisely that for which it is provided; and during which, its stipulations are to be as sacredly observed as the most acknowledged obligations under the law of nature or nations.

Article XXIII.

This treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; by the President of the

Mexican republic, with the previous approbation of its General Congress; and the ratifications shall be exchanged in the city of Washington, or at the seat of government of Mexico, in four months from the date of the signature hereof, or sooner if practicable.

In faith whereof, we, the respective plenipotentiaries, have signed this treaty of peace, friendship, limits, and settlement; and have hereunto affixed our seals respectively. Done in quintuplicate, at the city of Guadalupe Hidalgo, on the second day of February, in the year of our Lord one thousand eight hundred and forty-eight.

N. P. TRIST,	[L. S.]
LUIS G. CUEVAS,	[L. S.]
BERNARDO COUTO,	[L. S.]
MIGL. ATRISTAIN,	[L. S.]

ARTICLES REFERRED TO IN THE FIFTEENTH ARTICLE OF THE PRECEDING TREATY.

First and Fifth Articles of the unratified Convention between the United States and the Mexican Republic of the 20th November, 1843.

ARTICLE I.

All claims of citizens of the Mexican republic against the government of the United States, which shall be presented in the manner and time hereinafter expressed, and all claims of citizens of the United States against the government of the Mexican republic, which, for whatever cause, were not submitted to, nor considered, nor finally decided by, the commission, nor by the arbiter appointed by the convention of 1839, and which shall be presented in the manner and time hereinafter specified, shall be referred to four commissioners, who shall form a board, and shall

be appointed in the following manner, that is to say: Two commissioners shall be appointed by the President of the Mexican republic, and the other two by the President of the United States, with the approbation and consent of the Senate. The said commissioners, thus appointed, shall, in presence of each other, take an oath to examine and decide impartially the claims submitted to them, and which may lawfully be considered, according to the proofs which shall be presented, the principles of right and justice, the law of nations, and the treaties between the two republics.

ARTICLE V.

All claims of citizens of the United States against the government of the Mexican republic, which were considered by the commissioners, and referred to the umpire appointed under the convention of the eleventh April, 1839, and which were not decided by him, shall be referred to, and decided by, the umpire to be appointed, as provided by this convention, on the points submitted to the umpire under the late convention, and his decision shall be final and conclusive. It is also agreed, that if the respective commissioners shall deem it expedient, they may submit to the said arbiter new arguments upon the said claims.

APPENDIX H

Executive Orders Relating to the Jicarilla Apache Reservation

EXECUTIVE MANSION, FEBRUARY 11, 1887.

It is hereby ordered that all that portion of the public domain in the Territory of New Mexico which, when surveyed, will be embraced in the following townships, viz., 27, 28, 29, and 30 north, ranges 1 east and 1. 2. and 3 west; 31 and 32 north, ranges 2 west and 3 west, and the south half of township 31 north, range 1 west, be, and the same is hereby, set apart as a reservation for the use and occupation of the Jicarilla Apache Indians: *Provided.* That this order shall not be so construed as to deprive any bona fide settler of any valid rights he may have acquired under the laws of the United States providing for the disposition of the public domain.

GROVER CLEVELAND.

THE WHITE HOUSE, NOVEMBER 11, 1907.

It is hereby ordered that the following described lands in New Mexico. viz: Beginning at the northeast corner of township twenty-six north, range four west; thence east along the township line between townships twenty-six and twenty-seven north to the northwest corner of township twenty-six north, range five west; thence due south to the southeast corner of township twenty-two north, range five west; thence east on the township line between townships twenty-one and twenty-two north to the southeast corner of township twenty-two north, range one west; thence north to the northeast corner of township twenty-three north, range two west; thence west to the southeast corner of township twenty-four north, range four west; thence north

to the southeast corner of township twenty-six north, range four west; thence east to the southeast corner of township twenty-six north, range three west; thence north to the southeast corner of township twenty-seven north, range three west; thence east along the southern boundary of the present Jicarilla Indian Reservation to the range line between ranges one and two west, in township twenty-seven north, be, and the same are hereby, withdrawn from sale and settlement, and set apart for Indian purposes, for the use of the Indians of the Jicarilla Indian Reservation: *Provided.* That this withdrawal shall not affect any existing valid rights of any party.

THEODORE ROOSEVELT.

THE WHITE HOUSE, JANUARY 28, 1908.

Whereas it is found that Executive order of November 11, 1907, setting apart certain lands for the use of the Indians of the Jicarilla Indian Reservation, New Mexico, conflicts in part with Executive order of November 9, 1907, setting apart certain lands as an addition to the Navajo Indian Reservation, New Mexico, said Executive order is hereby so amended that the description of the tract of land thereby set apart for the purpose named therein shall read as follows:

Beginning at a point on the south boundary of the Jicarilla Indian Reservation on the range line between townships 26 and 27 north, ranges 2 and 3 west, New Mexico principal meridian: thence west on said south boundary to the southwest corner of the reservation; thence continuing west on the township line between townships 26 and 27 north to the northwest corner of township 26 north, range 5 west; thence south to the southwest corner of township 22 north, range 5 west; thence east along the township line

between townships 21 and 22 north to the northeast corner of township 21 north, range 4 west; thence continuing east over unsurveyed lands along what would be, if established, the township line between townships 21 and 22 north to what would be, if established, the southeast corner of township 22 north, range 2 west; thence north over unsurveyed lands to what will be when established the northeast corner of township 23 north, range 2 west; thence west over unsurveyed lands along what would be, if established, the township line between townships 23 and 24 north to what would be, if established, the southeast corner of township 24 north, range 4 west; thence north over unsurveyed lands to the southeast corner of township 25 north, range 4 west; thence continuing north along the east line of township 25 north, range 4 west, to the southeast corner of township 26 north, range 4 west; thence east over unsurveyed lands along what would be, if established, the township line between townships 25 and 26 north to what would be, if established, the southeast corner of township 26 north, range 3 west; thence north to the place of beginning.

THEODORE ROOSEVELT.

THE WHITE HOUSE, FEBRUARY 17, 1912.

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Carson National Forest, New Mexico, as proclaimed March 2, 1909, and modified by subsequent proclamation of August 24, 1910, be further modified by excluding therefrom all that part of the Jicarilla Apache Indian Reservation included in the said Carson National Forest by said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Jicarilla Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Carson National Forest had not been ordered, and said Indian Reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

APPENDIX I-1

(1) Jicarilla Tribal Oil and Gas Severance Tax Ordinance, July 9, 1976

(2) Amendment to Jicarilla Severance Tax Ordinance, January 26, 1977

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

OIL AND GAS SEVERANCE TAX
Ordinance No. 77-0-02

WHEREAS, under the Constitution of the Jicarilla Apache Tribe, the Tribal Council may impose taxes and fees upon persons and corporations doing business on the Reservation, including non-members of the Tribe; and

WHEREAS, under the Constitution of the Tribe, the Tribal Council has the authority and the obligation to govern the development of Tribal lands and other resources, and to develop such resources on sustained yield principles for the general welfare of the Tribe as a whole; and

WHEREAS, the Tribe has substantial reserves of oil and natural gas, which have been extracted from Tribal lands and exported from the Reservation, as a result of which the Tribe's resources are being rapidly depleted; and

WHEREAS, the only means by which the Tribe can establish adequate reserve funds to provide for the general welfare of the Tribe after depletion of its oil and gas is to impose a severance tax on oil and gas production.

NOW, THEREFORE, BE IT RESOLVED: That effective on the date set forth hereinafter, a severance tax is

imposed on any oil and natural gas severed, saved and removed from Tribal lands, as follows:

1. *Due Date of Tax*

Such taxes shall become due at the time of severance and payable monthly as herein provided.

2. *Rate of Tax — Gas*

The severance tax set forth herein shall be at the rate of 5¢ per million BTU of gas produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

3. *Rate of Tax — Oil*

The severance tax set forth herein shall be at the rate of 29¢ per barrel of crude oil or condensate as measured under the terms of this ordinance, which is produced on the Jicarilla Apache Reservation and sold or transported off the Reservation.

4. *Exemption*

Royalty gas, oil or condensate taken by the Tribe in kind, and used by the Tribe shall be exempt from taxation.

5. *Payment of Tax by Whom*

The operator of each well shall be liable for payment of the taxes assessed by this Ordinance and shall make payments pursuant to the terms hereof.

6. *Production Reports and Payments*

Within 45 days following the end of each calendar month, each operator of a well shall, in the statutory form and manner provided herein, make a return to the Tribe showing its total volume of oil, gas and condensate and BTU of gas produced from each well on Tribal lands for said calendar month and the amount of tax due. All taxes due or to be

remitted by the operator shall accompany the return. Any additional report or information the Treasurer of the Tribe may deem necessary for the proper administration of the severance tax may also be required.

7. *Measurement of Gas*

The determination of volume, specific gravity and heating value of gas (BTU content) on which tax shall be paid shall be as set forth in the contract in force between the lessee or operator of the wells on which the tax is payable, and the purchaser of such gas, as reported by the operator or producer to the U. S. Geological Survey. Measurements of volume and heating value shall be in accordance with standard industry practices.

8. *Measurement of Crude Oil*

Crude oil subject to tax shall be measured in acordance with current contracts of sale by the operator or producer and the purchaser of such oil and in accordance with standard industry practices.

9. *Severance Tax Fund Created*

There is created an Oil and Gas Severance Tax Fund, Jicarilla Apache Tribe. All monies received shall be held in suspense by the Treasurer of the Tribe in such fund until disbursed as hereinafter provided. The Treasurer of the Tribe may execute vouchers against this fund to make refund adjustments, payments of interest or payments for any purpose which this Ordinance may require.

10. *Reports by the Treasurer, Transfer of Funds*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe on the 15th day of January, April, July and October, showing the amount of money collected and deposited in the oil and gas severance tax

fund, any amount of money paid under protest, and such other information as deemed necessary to determine the amount of money in the fund which is unencumbered.

The Treasurer of the Tribe shall transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund, created by Tribal Ordinance No. 77-0-01, the amount of money which is unencumbered concurrently with the delivery of said report to the Tribal Council of the Tribe.

11. *Tax Refunds*

Any person paying any tax erroneously may apply for a refund within 30 days from the date of payment of tax to the Treasurer of the Tribe, and the Treasurer shall have the authority and duty with the concurrence of the Natural Resources Committee of the Tribal Council to refund such tax if found to be erroneously paid. Any refund may, in the discretion of the Natural Resources Committee of the Tribe, be in the form of credit against future tax payments.

12. *Taxes May be Paid Under Protest*

A person paying such tax may pay such tax under protest by filing a notice of protest with the Treasurer of the Tribe at the time of payment. The protest shall be referred to the Natural Resources Committee of the Tribe by the Treasurer, as to whether the protested tax shall be refunded and a report shall be made to the Tribal Council within 45 days after the payment of the protested tax recommending disposition of said protest. The Tribal Council shall make a final decision as to the refund of said tax. If any tax shall be found to be erroneously or illegally collected, interest at the rate of 6% per annum shall be allowed on the amount erroneously or illegally collected. In the event the Tribal Council of the Tribe decides adversely to the protestant, the protestant may take whatever legal action is appropriate under the laws of the United States. Any amount of

tax not paid when due shall bear 1% interest per month or a fraction thereof until paid.

13. *Consent to Suit*

For purposes of enforcement under § 11 or 12 hereof, the Jicarilla Apache Tribe consents to be sued either in the United States District Court for the District of New Mexico or in the Jicarilla Apache Tribal Court. The Tribe does not consent to be sued in the state courts of New Mexico.

14. *Severability*

If any part or application of this Ordinance is held invalid, the remainder of the Ordinance or its application to other situations or persons shall not be affected.

15. *Effective Date*

The effective date of this Ordinance shall be the first of the fourth month following the approval of this Ordinance by the Tribal Council of the Tribe and the Secretary of the Interior or his authorized representative.

CERTIFICATION

The foregoing Ordinance was enacted by the Tribal Council of the Jicarilla Apache Tribe on the 9th day of July, 1976, by a vote of 6 for, 0 against, and 0 abstaining, at a duly called meeting at which a quorum of the Tribal Council members were present.

HUBERT VELARDE
President

ATTEST:
BARBARA GONZALES
Secretary

APPROVED:
Secretary of the Interior of the United States

APPENDIX I-2

JICARILLA APACHE TRIBE

ORDINANCE OF THE TRIBAL COUNCIL

AMENDMENT TO SEVERANCE TAX ORDINANCE
Ordinance No. 77-0-195

WHEREAS, the Tribal Council of the Jicarilla Apache Tribe adopted the Severance Tax Ordinance, being Ordinance No. 77-0-02, on July 9, 1976; and

WHEREAS, said Severance Tax Ordinance made no provision for funds for administration thereof; and it is deemed by the Tribal Council to be advisable to take 5% of the Severance Tax Fund for administration of the ordinance and to establish a tax administration division; and

WHEREAS, it is deemed advisable to change the interest rate to be paid on taxes illegally collected,

NOW, THEREFORE, BE IT ORDAINED that Paragraph 10 of said Ordinance No. 77-0-02, Severance Tax Ordinance, shall be amended to read as follows:

10. *Reports by the Treasurer, Transfer of Funds, Administration*

The Treasurer of the Tribe shall prepare a report to the Tribal Council of the Tribe semi-annually, as of June 30th and December 31st of each year, showing the amount of money collected and deposited in the Oil and Gas Severance Tax Fund, and such other information as is deemed necessary to determine the amount of money unencumbered. The Treasurer shall deduct from the unencumbered amount 5% of such amount for administration of this Ordinance.

Said reports shall be submitted to the Tribal Council within 90 days of the end of each reporting period. Within 30 days of the approval by the Tribal Council of said reports, the Treasurer of the Tribe shall

transfer from the Oil and Gas Severance Tax Fund to the Oil and Gas Permanent Fund created by Tribal Ordinance No. 77-0-01 the amount of money which is reported to be unencumbered less 5% as above provided for administration of this Ordinance.

A Tax Administration Division is hereby established in the Treasurer's office, responsible to the Treasurer of the Tribe and the Tribal Council, with such personnel as shall be recommended by the Treasurer and approved by the Council. Expenses of said division shall be paid out of the 5% administration fund above established, as budgeted by the Tribal Council. Funds not expended or committed at the end of each fiscal year shall revert to the general fund of the Tribe.

BE IT FURTHER ORDAINED that the sentence beginning on the ninth line of Paragraph 12, entitled "Taxes May Be Paid Under Protest", shall be amended to read as follows:

If any tax shall be found to be erroneously or illegally collected, interest at the rate of 4% per annum shall be allowed on the amount erroneously or illegally collected.

CERTIFICATION

The foregoing ordinance was enacted by the Tribal Council of the Jicarilla Apache Tribe, on the 26th day of January, 1977, by a vote of 7 for, 0 against and 0 abstaining, at a duly called meeting at which a quorum of the Tribal Council members were present.

DALE VIGIL
President

ATTEST:
BARBARA GONZALES
Secretary

APPENDIX J-1

Notice of Clerk of Tenth Circuit dated July 24, 1979, of oral argument en banc.

TO: ALL COUNSEL IN THE CAPTIONED APPEALS

Re: Nos. 77-2102 and 77-2103 (Cross Appeals), Mescalero Apache Tribe v. Fred L. O'Cheskey, etc., et al.

Re: Nos. 78-1154 and 78-1251, J. Gregory Merrion, et al. v. Jicarilla Apache Tribe, et al.

Gentlemen:

The Court today, upon its own motion, has ordered the captioned appeals placed on the Calendar for oral argument and submission to the Court en banc on Wednesday, Septmeber 12, 1979, at 2:00 p.m. in Division I of the Court, C-404 United States Courthouse, 1929 Stout Street, Denver, Colorado 80294.

The Court wishes us to advise you that the Court would like the argument directed to the sovereignty issue.

Additional briefs or memoranda from the parties will be accepted for filing and presentation to the Court but the Court does not require you to file such briefs or memoranda.

Very truly yours,

HOWARD K. PHILLIPS
Howard K. Phillips
Clerk

HKP:cb

APPENDIX J-2

NORDHAUS, MOSES & DUNN
ATTORNEYS AT LAW

August 2, 1979

Hon. Howard K. Phillips, Clerk
United States Court of Appeals
10th Circuit
469 United States Court House
Denver, Colorado 80294

Re: Nos. 78-1154 & 78-1251, *Merrion & Bayless, et al.* v. *Jicarilla Apache Tribe et al.*, consolidated with *Amoco Production Company, et al.*, v. *Jicarilla Apache Tribe, et al.*

Dear Mr. Phillips:

With respect to your letter of July 24, 1979, advising us that the Court had ordered the above appeal together with the appeal in *Mescalero Apache Tribe* v. *O'Cheskey* for oral argument on September 12, and that the Court would like the argument directed to the sovereignty issue, we respectfully request advice as to whether the Court desires the sovereignty issue to be directed to the question of sovereign power of the Tribe to tax, or sovereign immunity of the Tribe from suit, or both.

Very truly yours,

ROBERT NORDHAUS
ROBERT J. NORDHAUS
NORDHAUS, MOSES & DUNN
Attorneys for Jicarilla
Apache Tribe

RJN/am
cc: Counsel of Record

APPENDIX J-3

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

August 6, 1979

Mr. Robert J. Nordhaus
Nordhaus, Moses & Dunn
800 American Bank of Commerce Complex
200 Lomas Boulevard, N.W.
Albuquerque, New Mexico 87102

Re: Nos. 78-1154 and No. 78-1251, Merrion & Bayless, et al. v. Jicarilla Apache Tribe, et al.

Dear Mr. Nordhaus:

Your letter asks for a further interpretation of the sovereignty issue which the Court asked you to address in its letter of July 24, 1979.

The Court responds to your inquiry by saying that the sovereignty issue with which it is particularly concerned is the power to tax.

Very truly yours,

HOWARD K. PHILLIPS
HOWARD K. PHILLIPS
Clerk

HKP: cb

cc: Ms. Maryann Walsh, Room 2343, Department of Justice, Washington, D.C. 20530
Mr. Jason W. Kellahin, Kellahin & Fox, P. O. Box 1769, Santa Fe, New Mexico 87501
Mr. Bruce D. Black, Campbell Bingaman & Black, P. O. Box 2208, Santa Fe, New Mexico 87501

Mr. Tom Burton, Mr. John Wimbish, Continental Oil Company, P. O. Box 2197, Houston, Texas 77001

Mr. Charles Sidun, Mr. Richard L. Marlar, Marathon Oil Company, Findlay, Ohio 45840

Mr. R. H. Landt, Amoco Production Company, Security Life Building, Denver, Colorado 80202

Mr. John R. Cooney, Mr. Mark B. Thompson, III, Modrall, Sperling, Roehl, Harris & Sisk, P. O. Box 2168, Albuquerque, New Mexico 87103

Mr. Reid Peyton Chambers, Sonosky, Chambers & Sachse, 2030 M Street, N.W., Washington, D.C. 20036

Mr. Charles A. Hobbs, 1735 New York Avenue, N.W., Washington, D.C. 20006

Mr. Jan Unna, Special Assistant Attorney General, P. O. Box 630, Santa Fe, New Mexico 87503

Mr. Robert W. Corcoran, Special Assistant Attorney General, Montana Department of Revenue, Sam W. Mitchell Building, Helena, Montana 59601